INDEX TO APPENDIX.

	PAGE
Docket Entries in the District Court	1
Docket Entries in the Court of Appeals	8
Complaint	13
Answer	16
Transcript of Proceedings, July 10, 1969	17

Defendant's Case:

	Direct Exam.	Cross Exam.	Re-direct Exam.	
Seth J. McKibbin	18	29		
Edward W. Noble	32			
John D. Barker		33		
Amended Answer				144
July 10, 1970, Opinion of the District Court				145
Transcript of Proceedings, May 10, 1971				167

Plaintiff's Case:

Seth J. McKibbin	168		169	
August 3, 1971, Opinion of the District Court				180
Judgment of the District Court				191
Opinion of the Court of Appeals				195
Judgment of the Court of Appeals				216
Order Allowing Certiorari				217

EXHIBITS.

Plaintiff's Exhibits:

Exhibit 1—Defendant's Answers to Plaintiff's Interrogatories, Set No. 1. 35

Exhibit 4—Defendant's Answers to Plaintiff's Interrogatories, Set No. 1. [Exhibit D, Responsive to Interrogatory No. 12] 48

PAGE

Exhibit 6—Defendant's Answers to Plaintiff's Interrogatories, Set No. 2, to the Extent Not Subject to Objections Now Pending 50
Exhibit 13—Exhibit I to Defendant's Answers to Plaintiff's Interrogatories, Set No. 2. [Responsive to Interrogatory No. V] 54
Exhibit 27—Defendant's Supplemental Answers to Plaintiff's Interrogatories, Set No. 2 56
Exhibit 30—Hourly Group Number Conversion Table 57
Exhibit 32—Conversion Schedule 58
Exhibit 33—Deposition of Edward W. Noble [November 6, 1968] 59
Exhibit 34—Evaluation Manual 68
Exhibit 36—Hourly Job Evaluation, Job No. 80-1353 .. 72
Exhibit 37—Hourly Job Evaluation, Job No. 80-4658 .. 76
Exhibit 38—Hourly Job Evaluation, Job No. 12-1354 .. 80
Exhibit 39—Hourly Job Evaluation, Job No. 4650 84
Exhibit 40—Hourly Job Evaluation, Job No. 95-4672 88
Exhibit 42—A Manual for Occupational Evaluation .. 93
Exhibit 47—Document *re:* Katherine Kessler 101
Exhibit 48—Document *re:* Helen M. Callanan 102
Exhibit 49—Document *re:* Hattie Strong 103
Exhibit 52—Document *re:* Carl D. Barney 104
Exhibit 53—Document *re:* James T. Thompson 105
Exhibit 58—Deposition of Seth J. McKibbin [November 7, 1968] 106
Exhibit 68-A—Female Schedule for Deriving Rate Ranges and Steps 123
Exhibit 68-B—Male Schedule for Deriving Rate Ranges and Steps 124
Exhibit 69—Revised Hourly Rate Schedule 125

PAGE

Exhibit 76-20—Agreement between Corning Glass Works and the American Flint Glass Workers' Union of North America, A.F.L.-C.I.O., Including Local Union No. 1000, January 9, 1964 127

Exhibit 82—Letter, dated May 4, 1964, from Charles A. Francik, to Messrs. Bradshaw, Dorwart, Gillen, Hall, Lang, Rhodes, Somers and Yeakey 128

Exhibit 91—Deposition of Arthur J. Agett [November 7, 1968] 131

Exhibit 93—Deposition of Earle Lewis [November 7, 1968] 133

Exhibit 97—Industry Wage Survey 140

Exhibit 101—Defendant's Answers to Plaintiff's Revised Requests for Admissions and Third Set of Interrogatories 173

Exhibit 101-A—Defendant Corning Glass Works' Response to Plaintiff's Requests for Admissions and Third Set of Interrogatories 176

Exhibit B—CGW Job Evaluation Installation Rules 177

Exhibit C—Job Evaluation Questions and Answers. 178

Exhibit A—Shift Differential 176

DOCKET ENTRIES IN THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 1967-29

Docket Entries

Date		
1967		
Jan.	20	Filed Complaint.
	20	Issued summons & copy.
	20	JS 5 made.
Feb.	1	Filed summons-served 1/27/67.
	17	Filed Deft's. Answer.
	17	Filed Deft's Interrogatories, Set No. 1.
Mar.	6	Filed Pltf's. Answers to Deft's Interrogatories, Set No. 1.
	13	Filed Pltf's. Interrogatories to Deft., Set. No. 1.
	29	Filed Stipulation extending deft's. time to answer interrogatories, Set No. 1, to 5/1/67.

Docket Entries in the District Court.

Date		
1967		
May	5	Filed Deft's. Answers to Pltf's. Interrogatories, Set. No. 1.
Dec.	22	Filed Pltf's. Interrogatories to Deft., Set No. 2.
1968		
Feb.	5	Filed Deft's. Motion to Extend Time to Answer Pltf's. Interrogatories to Deft., Set No. 2.
	5	Filed Deft's. Objections to Pltf's. Interrogatories to Deft., Set No. 2.
	12	Filed Deft's. Notice of Motion for an extension of time to answer pltf's. interrogatories, set No. 2, and deft's. objections to pltf's. interrogatories, Set No. 2—ret. 3/11/68—adj. gen.
Mar.	26	Filed Order & Motion for Enlargement of Time to File Objections to Pltf's. Interrogatories to Deft., Set No. 2—Henderson, J. (notice & copy to Mr. Hughes.)
Apr.	1	Filed Stipulation *re* Deft's. Objections to Pltf's. Interrogatories to Deft., Set No. 2 (proposed).
	15	Filed Stipulation *re* Deft's. Objections to Pltf's. Interrogatories to Deft., Set No. 2.
Aug.	20	Filed Deft's. Answers to Pltf's. Interrogatories, Set No. 2, to the extent not subject to objections now pending.
Sept.	4	Filed Decision & Order that deft's. objections to interrogatories are overruled and deft. will answer within 30 days—Henderson, J. (notice & copy to Messrs. Hughes & Olena.)

Docket Entries in the District Court.

Date		
1968		
Oct.	4	Filed Deft's. Supplemental Answers to Pltf's. Interrogatories, Set No. 2.
	18	Filed Pltf's. Note of Issue—Nov. 1968 Term.
Nov.	8	Filed Pltf's. Notice of Oral Depositions.
1969		
Feb.	4	Filed Order for Substitution of Party Plaintiff—Curtin, J. (notice & copy to Mr. Olena.)
Apr.	14	Pretrial Conference (JTC).
May	1	Filed Depositions of F. Phillip Hunt, Charles B. Wilson, Bernard J. Cushing, Thomas Tuthill, Donald A. McCabe, Earle Lewis, Arthur J. Agett, Bernard Shinners, Seth McKibbin and Edward W. Noble (notice to attys).
	14	Filed Deft's. Amended Answers to Pltf's. Interrogatories Set No. 1: Interrogatories Nos. 6 & 7.
	29	Filed Pltf's. Interrogatories to Deft.
June	26	Filed Deft's. Motion for Protective Order—ret.
July	8	Trial before Judge Curtin.
	9	Filed Court Reporter's Transcript of Proceedings held 7/8/69 (Vol. I).
	9	Trial Contd.
	10	Trial Contd.

Docket Entries in the District Court.

Date		
1969		
July	11	Filed Court Reporter's Transcript of Proceedings (Vol. 2, 3 & Index).
	15	Trial Contd.—Submitted.
	18	Filed Court Reporter's Transcript of Proceedings (Vol. IV).
1970		
July	10	Filed Deft's. Motion to Amend Answer to Conform to the Evidence.
	10	Filed Deft's. Amended Answer.
	10	Filed Decision & Order that the deft. is restrained from withholding the payment of wages due for the period from 11/1/64 to 11/68, etc.—Curtin, J. (notice & copy to Mr. LaRuffa and Reed, Smith, Shaw, etc.)
	20	Filed Pltf's. Motion to Amend and Make Additional Findings and Grant Further Injunctive Relief—Hearing 9/18/70—adj. 11/10.
Sept.	18	Filed Affidavits—Victor Foinsbee, Norma Hartwell and John Bloise.
	28	Filed Pltf's. Request.
Oct.	5	Filed Court Reporter's Transcript of Proceedings of 9/18/70.
	21	Filed Deft's. Motion to bring in additional defendants—ret. 11/13/70—D.

Docket Entries in the District Court.

Date	
1970	
Oct. 26	Filed Pltf's. Notice of Motion for an Order compelling Deft., to respond to request for admissions, etc.—ret. 11/13/70—Deft. must answer or object to interrogatories by 12/11/70. Arguments on objections to be heard on 12/18/70—Pltf. to answer by 12/24/70. Deft. to answer by 1/29/71.
Nov. 30	Filed Deft's. Request for Admissions & Second Set of Interrogatories.
Dec. 2	Filed Order denying Pltf's. Motion to amend Order of 7/10/70 and denying Deft's. Motion to bring in additional defendants, etc.—Curtin, J. (Notice & copy to Messrs. LaRuffa, Olena & Reed, Smith).
Dec. 3	Filed Deft's Request for Admissions & Second Set of Interrogatories.
9	Filed Court Reporter's Transcript of Proceedings of 11/13/70.
14	Filed Pltf's. Answers to Deft's. Request for Admissions & Second Set of Interrogatories.
14	Filed Deft., Corning Glass Works' Response to Pltf's. Requests for Admissions & Third Set of Interrogatories.
28	Filed Pltf's. Revised Requests for Admissions & Third Set of Interrogatories.
28	Filed Pltf's. Revised Answers to Deft's. Request For Admissions & Second Set of Interrogatories.

Docket Entries in the District Court.

Date		
1971		
Jan.	26	Filed Court Reporter's Transcript of Proceedings of 12/18/70.
Feb.	1	Filed Deft's. Answers to Pltf's. revised requests for admissions & Third Set of Interrogatories.
May	10	Motion by Pltf., to amend court's finding & for further injunctive relief—attys. to file proposed findings of fact & conclusions of law by 7/10/71.
	19	Filed Pltf's. Notice of Motion for an order permitting the addition of certain Exhibits—ret. 5/26/71.
	21	Filed Court Reporter's Transcript of Proceedings of 5/10/71.
Aug.	3	Filed Decision & Order restraining Deft., from withholding payment of wages due Deft's., employees under the Fair Labor Standards Act; granting Pltf's., application for an injunction and enjoining the Deft., from future violations of the Act and fixing interest rate of 6% on amounts withheld, etc.—Curtin, J. (notice & copy to Messrs. LaRuffa, Olena and Reed, Smith, etc. and Isabelle Cappello).
Oct.	1	JS 6 made.
	1	Filed Deft's. Notice of Appeal (copy mailed to Mr. LaRuffa).
	29	Filed Motion for extension of time for transmission of record on appeal and Order extending time to 12/9/71—Curtin, J. (notice & copy to Mr. LaRuffa).

Docket Entries in the District Court.

Date		
1971		
Nov.	15	Filed Pltf's. Notice of Settlement—ret. 11/19/71 adj. generally.
	15	Filed Pltf's. Affidavit of Service of Notice of Settlement.
	30	Filed Judgment—Curtin, J. (notice & copy to Mr. Olena).
	30	Filed Motion and Order for Stay of Judgment—Curtin, J. (notice & copy to Mr. LaRuffa).
	30	Filed Affidavit *re* annual report of Corning Glass Works.
	30	Filed Exhibit "A" to Judgment—Deft's. Liability Computation 11/1/64 thru 6/27/71.
Dec.	15	Filed copy of order of U. S. Court of Appeals extending time to file record and docket appeal to 3/13/72.
1972		
Jan.	26	Filed Deft's. Notice of Appeal (copy mailed to Mr. LaRuffa and to Clerk, CCA with copy of docket entries).
	26	Filed Bond for $500 costs on appeal in form of letter transmitting checks.

DOCKET ENTRIES IN THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPEAL FROM WESTERN DISTRICT OF NEW YORK

Case No. 72-1229

Title of Case:

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee,

v.

CORNING GLASS WORKS, a Corporation,
Defendant-Appellant.

(& in 72-1230)

TRANSFERRED FROM MR 5003 Calendar No. 252

Attorneys for Appellee:
Francis V. LaRuffa
Regional Solicitor
U. S. Dept. of Labor
341 Ninth Avenue
New York, N. Y. 10001

Docket Entries in the Court of Appeals.

Attorneys for Appellant:
(from order dated 8/3/71)
Harry H. Weil
Scott F. Zimmerman
Walter P. DeForest
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pa. 15230
(412 288-3131)

No. Below: Civ-1967-29

Judge Below: J. T. Curtin

Date of Decision & Order: 8/3/71

Notice of Appeal Filed: 10/1/71

Docket Entries

Date	
12– 3–71	Filed motion for extension of time to transmit record and docket appeal with proof of service.
12– 8–71	Filed order granting motion for extension of time to file record and docket appeal to 3-13-72.
1–31–72	Filed copies of docket entries and notice of appeal.
3– 3–72	Received docket fee (from order dated 8-3-71).

Docket Entries in the Court of Appeals.

Date	
3– 3–72	Received docket fee (from judgment entered 11-30-71) (& in 72-1230).
3– 8–72	Filed order consolidating appeals and extending time to transmit and docket the record by 3-13-72 (& in 72-1230).
3–10–72	Filed partial record (original papers of district court).
3–27–72	Filed stipulation *re:* deferred appendix (& in 72-1230).
4–12–72	Filed motion for extension of time to file appellant's brief and designation of contents of appendix (& in 72-1230).
4–13–72	Filed order granting motion for extension of time to file appellant's brief and designation of contents of appendix to 4-28-72.
5– 1–72	Filed brief, appellant with proof of service (& in 72-1230)—by mail.
5–22–72	Filed motion for extension of time to file appellee's brief with proof of service (& in 72-1230).
5–23–72	Filed order granting motion for extension of time to file appellee's brief to 6-30-72 (& in 72-1230).
7– 3–72	Filed motion for extension of time to file appellee's brief with proof of service.
7– 5–72	Filed order extending time to file appellee's brief to 7-10-72.

Docket Entries in the Court of Appeals.

Date	
7–12–72	Filed motion for extension of time to file appellee's brief with proof of service (& in 72-1230).
7–14–72	Filed order granting motion to extend time to file appellee's brief to 7-17-72 (& in 72-1230).
7–20–72	Filed motion for extension of time to file appellee's brief with proof of service.
7–21–72	Filed order granting motion to extend time to file appellee's brief to 7-21-72.
7–25–72	Filed order granting leave to file page proof copies appellee's brief.
7–25–72	Filed 4 copies page proof brief, appellee (& in 72-1230).
8– 2–72	Filed motion for extension of time to file appellant's reply brief and joint appendix with proof of service.
8– 3–72	Filed order granting motion to extend time to file appellant's reply brief and joint appendix to 8-14-72.
8– 9–72	Filed motion for extension of time to file appellant's reply brief and joint appendix with proof of service.
8–11–72	Filed order granting motion for extension of time to file appellant's brief and joint appendix to 8-28-72.
8–31–72	Filed brief, appellant (by mail).
8–31–72	Filed reply brief, appellant (by mail).

Docket Entries in the Court of Appeals.

Date	
8–31–72	Filed joint appendix, with proof of service (by mail).
9–12–72	Filed brief, appellee with proof of service.
1– 4–73	Argument heard (by: Friendly, Ch. J., Kaufman, C. J. and Holden, D. J.) (& in 72-1230).
2– 2–73	Judgment Modified and Affirmed, Friendly, Ch. J. (& in 72-1230).
2– 2–73	Filed judgment (& in 72-1230).
2–21–73	Filed motion to stay the issuance of the mandate pursuant to 41 (b) with p/s.
3– 5–73	Filed order granting motion to stay issuance of the mandate pursuant to 41(b); no bond is required (& in 72-1230).
4–20–73	Certified original record and proceedings for: Reed, Smith, Shaw & McClay.
4–20–73	Filed notice by Supreme Court extending time to file a writ of certiorari to 7-2-73.
4–26–73	Filed motion to further stay the issuance of the mandate with p/s.
5– 2–73	Filed order granting motion to further stay the issuance of the mandate to 7-2-73 (& in 72-1230).
7– 2–73	Filed notice of filing of petition for writ of certiorari (& in 72-1230) (S. C. No. 73-29).
7–20–73	Filed receipt by Supreme Court of original record.
12–26–73	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 72-1230).

COMPLAINT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,
Defendant.

Civil Action No. 1967-29.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a) (1) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended, [52 Stat. 1060; 29 U. S. C. 201-219], hereinafter called the Act, and to restrain any withholding of payment of wages found by the Court to be due to employees under the Act.

I.

Jurisdiction of this action is conferred upon this Court by Section 17 of the Act.

II.

Defendant, CORNING GLASS WORKS, is and at all times hereinafter mentioned was a New York corporation having an office and place of business at Corning, Steuben County, State of New York, within the jurisdiction of this Court, and is and at all times hereinafter mentioned was engaged in the manufacture and distribution of glassware.

III.

At all times hereinafter mentioned defendant employed, and it is employing, many employees in and about its aforesaid place of business in the manufacture and distribution of diverse types of glasses and glassware. Substantial quantities of the goods produced by these employees have been and are being produced for commerce within the meaning of the Act, and have been and are being transported, offered for transportation, shipped, delivered, and sold in commerce from defendant's aforesaid place of business to other states.

IV.

Defendant, an employer having employees subject to the provisions of Section 6 of the Act, as aforesaid, has repeatedly violated, and it is violating, the provisions of Sections 6(d) and 15(a)(2) of the Act by discriminating, within its aforesaid establishment in which such employees have been and are employed, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the rates at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

V.

Defendant has repeatedly violated, and it is violating, the provisions of Section 15(a)(1) of the Act in that it has transported, offered for transportation, shipped, delivered, and sold in interstate commerce, from its aforesaid place of business to other states, goods in the production of which many of its employees were employed in violation of Section 6 of the Act, as alleged.

VI.

Since on or about June 11, 1964 defendant has repeatedly violated, and it is violating, the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is expressly authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays judgment permanently enjoining defendant, its officers, agents, servants, employees and those persons in active concert or participation with them from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of any withholding of payment of wages found by the Court to be due to employees under the Act.

CHARLES DONAHUE,
Solicitor,

JOHN A. HUGHES,
Regional Attorney,

FRANCIS V. LaRUFFA,
Supervising Attorney,

United States Department of Labor,

Attorneys for Plaintiff.

Post Office Address:
John A. Hughes,
Regional Attorney,
U. S. Dept. of Labor,
341 Ninth Avenue,
New York, N. Y. 10001.

[Filed, January 20, 1967]

ANSWER.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Defendant, Corning Glass Works, files the following Answer to the Complaint in the above-captioned case:

1. The averments of Paragraphs I, II and III of the Complaint are admitted.

2. The averments of Paragraphs IV, V and VI of the Complaint are denied.

WHEREFORE, Defendant prays that the Complaint be dismissed.

/s/ .....,
ARNOLD T. OLENA,

/s/ .....,
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR,
800 M & T Building,
Buffalo, New York.

/s/ .....,
JOHN G. WAYMAN,

/s/ .....,
LEONARD L. SCHEINHOLTZ,

/s/ .....,
REED, SMITH, SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania,

Counsel for Defendant,
Corning Glass Works.

[Filed, February 17, 1967]

[389] **TRANSCRIPT OF PROCEEDINGS, JULY 10, 1969.**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Proceedings of trial held before the Hon. John T. Curtin, United States District Court Judge, at the United States Court House, Buffalo, New York, resuming on July 10, 1969.

Appearances:

Francis V. LaRuffa, Chief Trial Attorney, and Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, Attorneys for the Plaintiff.

Reed, Smith, Shaw & McClay, Attorneys for the Defendant; John G. Wayman, Esq., and Scott F. Zimmerman, Esq., of Counsel.

• • •

[400] The Court: Let us leave that as it is. All right. What do we have? Do we have any testimony today or any other offers?

Mrs. Cappello: Your Honor, the Government has reviewed its case and we believe we have established what we set out to prove and anything further would be cumulative and therefore we plan to rest and do rest.

• • •

[404] Mr. Wayman: If it please the Court, I have decided that I do not wish to make any motions at this time. I would prefer to go ahead with my witnesses.

• • •

[405] SETH J. McKIBBIN (137 Davis Street, Painted Post, New York), being duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Wayman:

* * *

[410] Mr. Wayman: Yes, sir.

The Court: You said,—maybe this is explained somewhere else,—"steady third shift rate". What do you mean by a steady third shift rate?

Mr. Wayman: For Inspectors.

The Court: What do you mean by that?

The Witness: We have had a past practice, your Honor, of paying Inspectors on the night shift a different rate than we have paid the day shift Inspectors, and it was originated back in the 1927 to 1930 era.

The Court: All right. Go ahead, Mr. Wayman.

By Mr. Wayman:

Q. Has that steady third shift rate ever been paid except to employees on the steady third shift? A. No, sir, not to the best of my knowledge.

The Court: Now,—go ahead, Mr. Wayman. Perhaps right now, your prior question had to do only with inspection jobs. Now you talk about all jobs.

Mr. Wayman: I am speaking only of the inspection jobs, your Honor. May I amend the question, your Honor?

The Court: All right.

By Mr. Wayman:

[411] Q. Has that steady third shift rate for Inspectors ever been paid to any employees except employees who work on the steady third shift? A. That is the question I answered before. Yes, I understood it was inspection.

Q. Did you search the records to see whether or not it has? A. Yes.

Q. And your finding was it had not been paid to anybody except those employees? A. That is right.

Q. Whether they were men or whether they were women? A. This applicable rate was paid to men or women who worked the night shift.

Q. Now, do I understand correctly that there is a change in that as a result of recent contract negotiations? A. Yes, sir, that is correct.

Q. What was the change? A. Part of our recent negotiations which were consummated in January of 1969, the Union and Management groups agreed to install a new job evaluation program in the Corning area, and as a result of that we currently have the one job for inspection for the new people that we may hire after January 20, 1969.

• • •

[414] Q. What, if anything, happened on June 1, 1966, that changed that? A. On June 1st, 1966, as a result of an agreement between the union and the management groups, we consolidated our seniority lists and thereafter applied employee rights to jobs in accordance with one seniority list.

Q. Did that mean that women could take jobs, if they had the seniority on the steady third shift? A. They could, very well.

Q. Did any of them do it? A. Yes, they did in fact.

Q. When they worked on the steady third shift, did they receive the same rate that the men received on this steady third shift? A. They did, sir.

Q. Did any men work on the first and second shifts? A. They did.

Q. What rate did they receive? A. The same rate that the women working the day and afternoon shifts received.

Q. I'm going to ask you to look at Plaintiff's Exhibit 12, which has been entered in the record, and ask you whether or not, looking at that exhibit and the [415] information contained therein, you can tell us the earliest date on which any employee having seniority, would have been able to take a job on the steady third shift as an inspector? Can you do that by looking at that exhibit? A. Yes, if I may stand.

The Court: Surely.

The Witness: May I use a particular plant as a specimen, for example "A" Factory?

The Court: Yes, sir.

Mr. Wayman: May we go off the record a moment, your Honor.

The Court: If you desire.

(Whereupon, an off-the-record discussion ensued.)

The Court: For the convenience of the witness, we have permitted him to use a copy of Exhibit 12, which he had marked some notes in as an aid to his testimony. Plaintiff's counsel have an opportunity to look at these if she desires on cross examination.

The Witness: By analyzing the information that is in this particular exhibit, and I happen to be looking at "A" Factory—

[416] The Court: Is there a page or some other reference to this, Mr. McKibbin?

The Witness: I am afraid the pages are not numbered correctly, so that you can go from one copy to another.

The Court: Is there some way you can refer to that page?

The Witness: Yes.

By Mr. Wayman:

Q. Can you give us the name and number of the person to whom you are referring? A. If you look at the information on women in "A" Factory, on job code 4570 as a for instance, this is one of the inspection job codes identified in the exhibit introduction.

Q. Is that night inspection? A. That is a night inspection occupation, yes. And, the week of June 1, the week which included June 1, 1966, in this, nomenclature, was the 23rd week of 1966, and we find that we had women with relatively junior service dates going on there as early as the 42nd week of 1966.

Q. What would be the 42nd week, what month? A. That would be about October or November. I have a conversion schedule, but it's not with me. We had two employees with 1966 service dates. These people [417] were specifically hired May 18, 1966. That is their service date listed on this exhibit.

The Court: Does it give the name?

The Witness: Yes, sir. Their names are C. V. Furney, employee No. 32756. The second employee

listed on this exhibit is W. H. Stewart, employee No. 87375.

By Mr. Wayman:

Q. You say their service dates were May 18, 1966? A. That is correct.

Q. That means they were hired then? A. Yes. That is when they started employment.

Q. They took the night inspection job 4570? A. That's right.

Q. In the 42nd week? A. That's right.

Q. Now, what significance does that have as to anybody that had a service date earlier than May 18, 1966? A. In accordance with our seniority rules that are in effect, any employee who had wanted to go on the night inspection job, could have transferred ahead of this new employee going on that job, by exercise of his or her seniority subsequent to the June 1, 1966 date.

Q. All right. Have you any other examples such as Furney and Stewart? [418] A. Yes, I do find the same thing in Pressware.

Q. All right. Would you do that please? A. I have identified R. J. Jellison, employee No. 47911, who went on the job code 4551, which was a TV inspector nights, on the 23rd week of the year, 1966, which would be the week which included June 1, of that year and at that time, according to the exhibit, his service date was May 9, 1966, and I would draw the same conclusion that any employee wishing to go on nights, could have done so.

Mr. LaRuffa: I move that that be stricken, your Honor. Any conclusion that can be drawn from that would be drawn by the Court.

The Court: All right, overruled. I will permit his answer.

[419] By Mr. Wayman:

Q. Go ahead, Mr. McKibbin. A. I would conclude from this information that any employee whose service date was prior to 5/9/66, could very well have taken a job if he or she exercised his rights under the contract.

Q. His seniority rights you speak of? A. Yes.

The Court: Is this individual Jellison, is that a lady or a man?

The Witness: That is a man, your Honor.

The Court: The prior one you told us about was a woman?

The Witness: Right. I could find a woman under similar circumstances. I have not taken time to. I just spotted a couple before I came in.

The Court: How do you tell the difference between men and women?

The Witness: In the right-hand column there is a column called "Sex" and there is an "M" or an "N".

By Mr. Wayman:

Q. So that by reference to this exhibit without going through the whole thing and picking out all of them, we find somebody that was hired on to the [420] night inspection job, we know anybody having seniority as of that date could have taken the job if they desired? A. Yes.

Mr. LaRuffa: I object to the leading. After all, Mr. McKibbin is Mr. Wayman's witness and he is not on cross examination.

The Court: I realize it is leading, Mr. LaRuffa, but I will overrule the objection. It is difficult to testify from these documents. Overruled.

• • •

[421] By Mr. Wayman:

Q. Can you tell us some shift differentials which you found in your research in this part of New York State that might be as high or higher than the differential paid the night shift rate inspection and the day shift rate?

[422] Mrs. Cappello: Your Honor, we object unless it is confined to the glass industry.

The Court: I will listen to it. As far as materiality and relevancy, we will determine that after listening to the testimony.

Mr. Wayman: It might well go to the weight. My own argument has been what somebody else pays is irrelevant, but we have heard others and I would like Mr. McKibbin to give us the result of his study. Can you answer that?

The Court: If we are in the Corning or Elmira area and there is other industry other than glass there, an individual can hire out to other,—let's say machine shops or other industry, wouldn't that have some bearing upon what the night shift differential would be?

Mrs. Cappello: We know, your Honor, the circumstances of why they were on three shifts in the glass industry. They have Lehrs continually turning out glass. We would have to know the circumstances why they are running a third shift.

The Court: Each business is different. Go ahead.

[423] The Witness: As I understand the question, my answer would be, yes, I have researched the shift differential paid steady night shifts in our Western New York area generally, and I can cite several in the immediate vicinity. We have General Electric and Westinghouse plants who are competitors in our labor market area.

By Mr. Wayman:

Q. Where are they located? A. Westinghouse is in Horseheads which is 12 to 14 miles. I am not specific, but it is of that magnitude, to our east. They also have a plant in Bath, some 20 miles away. In their Horseheads plant their contract calls for a 10 per cent shift differential.

The Court: This is Westinghouse?

The Witness: Yes, your Honor.

The Court: At Horseheads?

The Witness: Yes.

The Court: Could you tell us generally about how many employees there are, what they make there and so on?

The Witness: They process glass tubes, glass envelopes, and they make glass, specialty [424] glass tubes for radar and X-ray and this type thing. I am not intimately familiar with their product line.

The Court: Just generally speaking?

The Witness: Generally speaking.

The Court: All right.

By Mr. Wayman:

Q. Do you have any idea of the approximate number of employees? A. I believe it is around 900.

Q. I think you mentioned General Electric? A. General Electric has a foundry in Elmira City which is 15 to 18 miles, something like that. It is a couple miles beyond, the Westinghouse plant. They likewise pay a 10 per cent steady night shift differential in that plant. It is a foundry and I am not sure what product they make beyond that.

Q. The approximate number of employees, if you can remember? A. I believe it is around 750.

Q. Have you checked any other large employers in Western New York?

Mr. LaRuffa: If your Honor please, is it your Honor's decision to permit the witness to answer as to any industry in this area?

The Court: Just a minute, Mr. LaRuffa. Let's [425] take them one at a time. When you say "Western New York"—

Mr. Wayman: We will give the location.

The Court: Let's give the location so we can have definite objections and rulings.

The Witness: I have knowledge of three or four other companies in the Western New York area. Xerox in Rochester has a contract that calls for a shift differential on the night shift of 50 cents.

By Mr. Wayman:

Q. You say "a contract". Do you mean a Union Contract? A. Yes.

Mr. LaRuffa: I object, your Honor.

The Court: You object to Xerox in Rochester?

Mr. LaRuffa: I am, because if we are now dealing with the glass industry—

The Court: We are not, certainly not,—different factors. How far is Rochester from Corning?

The Witness: 85 to 90 miles.

The Court: Then—

Mr. LaRuffa: We have different factors, if your Honor will hear them.

The Court: I think, Mr. Wayman, what I will do here, Mr. Wayman, I will defer ruling [426] on this. We have Mr. McKibbin here. He has made the study and we presume he has made it accurately. I will defer ruling on this. My present thought is we are getting far afield. If you can convince me later on I should consider, I will.

Mr. Wayman: I would like to offer the evidence and we can argue about the weight and materiality.

Mr. LaRuffa: Your Honor, I want to indicate this—

The Court: You continue to object, Mr. LaRuffa, as we go on and we will rule on it later on.

Mr. LaRuffa: I merely want to bring—

The Court: Mr. McKibbin is here.

Mr. LaRuffa: I merely want to bring to the Court's attention when we are speaking of Rochester we have a different labor situation in Rochester.

The Court: I realize that. That is a matter of argument I will listen to. I appreciate all those things, but you object as we go on so we have a record. Xerox you object to. I will defer on that.

By Mr. Wayman:

[427] Q. Any others? A. I have two others, Kodak in Rochester pays 12½ percent, but not less than 30 cents.

Mr. LaRuffa: I object.

The Court: All right, deferred. That would be in all the Kodak plants?

The Witness: In Rochester, New York, yes, sir.

The Court: Twelve and one half?

The Witness: It is the formula paid shift differential on the late night shift is 12½ percent, but not less than 30 cents.

The Court: All right.

By Mr. Wayman:

Q. All right. Any others? A. One other is IBM down in Owego, New York, has an establishment there, and their shift differential on the late night shift is 14 percent.

Mr. LaRuffa: Same objection.

The Court: Deferred. Mr. McKibbin, your study was made this year?

The Witness: Yes.

The Court: As of now?

The Witness: Yes, your Honor.

[428] The Court: Now, do you know, did you make any study as to whether these men's jobs, or ladies' jobs, or did you make a study in that regard?

The Witness: I did not inquire into the sex of the employees that worked there, your Honor.

The Court: Fine.

Mr. Wayman: I am sure that everybody in this room, perhaps except as to Mr. Zimmerman and myself, knows where Owego is. I don't know. Could you tell us how far that is from Corning?

The Court: I don't know, but I think we should hear it from Mr. McKibbin.

The Witness: I would estimate it's approximately fifty miles east of Corning.

By Mr. Wayman:

Q. Do they also have a plant in Binghamton? A. In Endicott. They have plants in the Southern Tier of New York State, in that general vicinity, but—

The Court: How far is Binghamton from Corning?

The Witness: Eighty-five miles.

The Court: And Endicott?

The Witness: Eighty miles.

• • •

---

[429] SETH J. McKIBBIN, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. LaRuffa:

• • •

[431] Q. Did you, in any way, study any of the publications of the Bureau of Labor Statistics, and more specifically with respect to a bulletin that was issued in December of 1964? A. I did.

Q. And that related to what years? A. My recollection, that it was published in May of 1964, and the date of the data therein was 1963.

Q. I show you Plaintiff's Exhibit No. 97, marked for identification, and ask you whether or not this is one of the publications that you reviewed? A. I believe this another copy of the same study, yes.

Q. You did study this one? A. Yes.

• • •

[432] Q. Mr. McKibbin, I show you Government's Exhibit 97 in evidence and can you,—and I call specific attention to page 26 and ask you, do you recall [433] studying those schedules dealing with night shift differentials? A. Yes, I looked at them.

Q. Will you indicate to the Court where in that publication does it appear that any firm receives as much as the amount that you indicated on your direct testimony? A. I indicated several amounts in my direct testimony. I am not sure which one you refer to.

Q. Were any of those amounts obtained from information in this schedule? A. They were not. All of the information that I cited was current information and as best I can recall, this is 1963 information.

• • •

[435] Q. But in Corning, New York, the night shift differential to Inspectors is only paid to Inspectors, is it not? A. Currently.

Q. Is it paid to any other employees? A. Not currently.

Q. I mean now, Mr. McKibbin, not the night shift differential but the differential in basic rate. Is that paid to any other employees working that third shift? A. That is the question I understood and currently we have no other employees that are similarly situated.

Q. Other than Inspectors? A. That is right.

The Court: Now, you are talking about at the present time, Mr. McKibbin?

The Witness: Yes, your Honor.

By Mr. LaRuffa:

Q. It was at all times, was it not, since time immemorial, was it not? A. No, I think in our research for you and in

your [436] presence in Corning I believe I pointed out that there had been other job classifications that were similarly situated where there was a steady night shift differential between—there was a differential between the steady night shift and the day shift, day and afternoon shifts.

Q. In the basic rate? A. In the basic rate.

• • •

[438] By Mr. LaRuffa:

Q. Is this what you referred to in your language "a supplemental night shift differential escalating night shift differential?" A. I am not sure of the precise language but yes, we tried to describe the fact as best we could.

Q. Did you invent that language? A. No, sir.

Q. Who did? A. An associate of mine at Corning Glass Works.

Q. Have you ever heard of that language or that phraseology in industry as such? A. No, sir.

• • •

[443] By Mr. LaRuffa:

Q. And also for your same question outside of New York, outside of Corning, New York, is there any branch plant where the same job classification or job, is paid at a different basic rate when worked at a different shift? A. There is, to my knowledge.

Q. Will you indicate what those are and where? A. There are two that I am aware of, Central Falls, Rhode Island and Wellsboro, Pennsylvania.

Q. And Central Falls, Rhode Island, is the one that is also subject to litigation, is that correct? A. I believe so.

The Court: What job is that, Mr. McKibbin, do you [444] know?

The Witness: I believe the job classification in Rhode Island is an inspector operative job title. I think the one in Wellsboro may be inspector, Class C, or inspector Class B and C. There may be others that I don't recall at the moment.

By Mr. LaRuffa:

Q. Mr. McKibbin, in Corning, New York, until June of 1966, you always had a male rate and a female rate, is that correct? A. Yes.

Q. Because of that, isn't it a fact that the female rate up to 1966 was always lower than the male rate? A. I believe that is correct.

Mr. Wayman: Objected to.

The Court: Overruled.

• • •

[447] Q. Isn't it a fact that women could only transfer to a night shift if a vacancy occurred after that seniority date? A. After June 1, 1966, yes.

• • •

---

[449] EDWARD W. NOBLE (120 Circle Drive, Bath, New York), being duly sworn as a witness in behalf of the Defendant, testified as follows:

Direct Examination by Mr. Wayman:

Q. Mr. Noble, I believe you have already given the deposition and I just have a couple of questions for you in addition to the answers you have given therein. You are of course familiar with the CGW Job Evaluation system? A. Yes.

Q. Did you assist in developing that system? A. Yes.

Q. Does the CGW Job Evaluation system take into account in any manner any factor whether the work is done at day or night? A. It does not.

Q. Are you also familiar with the so-called SJ & H Plan? A. Yes.

Q. Did that plan take into accounnt any factor as to whether or not the work was done at day or night? A. It did not.

* * *

---

[460] JOHN D. BARKER (295 West William Street, Corning, New York), a witness called by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

* * *

[462] Cross Examination by Mrs. Cappello:

* * *

By Mrs. Cappello:

Q. Excuse me, Mr. Barker. The women who worked on the night shift then were paid the same as the women who worked on the day or night shift during World War II? A. Do I understand right? Is this on a woman's job or a man's job you are referring to?

Q. What is the woman's job?

The Court: We are referring to World War II.
The Witness: Right.
The Court: All right.

The Witness: The women's job was the inspection job, but then when you go on nights, the man, he was doing the job and he got extra pay for it.

By Mrs. Cappello:

Q. Yes, we understand. A. So when the women went on nights, she got the same rate he did. If she came back on days, she got the [463] women's rate for the job.

Q. You said, some women on the night shift, continued to receive the same rate as the women on the afternoon shift? A. I did not say that.

Q. I do not understand your position. Some women did not get the male rate at night? A. They did not get the full rate, some of them, because they did not do the same job as the man. They were physically unable to do so.

Q. What rate did they get compared to the women on the day shift? A. They got the women's rate, plus whatever percentage of the man's job she did at that time.

Q. They weren't getting the differential, because it was at night? A. No, she was not.

• • •

PLAINTIFF'S EXHIBIT 1.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES
SET NO. 1

Defendant by SETH J. McKIBBIN, Manager of Statistics and Surveys, Corning Glass Works, answers plaintiff's interrogatories as follows:

Interrogatory No. 1:

1. (a) Name, by plant, and in order of seniority, all Class C, Class B, General TV, and TV Inspectors for the period from June 11, 1964, to May 31, 1966.

(b) As to each Inspector named in answer to (a), state:

* * *

(8) Shift differential set by union contract, if any

* * *

Answer to Interrogatory No. 1:

* * *

(8) Shift differential set by union contracts dated January 9, 1964 and December 17, 1965, applicable to the period of June 11, 1964 through May 31, 1966 were as follows:

Plaintiff's Exhibit 1.

"Shift Differential:

"Section 1. Workers employed on shifts starting at 2:00 P. M., 3:00 P. M., and 4:00 P. M. will be paid $0.06 per hour as a premium for such work.

"Section 2. Workers employed on non-rotating shifts starting at 10:00 P. M., 11:00 P. M., and Midnight will be paid $0.12 per hour as a premium for such work.

"Section 3. Workers employed on rotating shifts starting at 10:00 P. M., 11:00 P. M., and Midnight will be paid $0.08 per hour as a premium for such work."

In addition the parties, by a past practice endorsed by union contract, paid a supplemental escalating shift differential to inspectors who worked a non-rotating night shift.

• • •

Interrogatory No. 8:

8. Since June 11, 1964, have the men and women Class C, Class B, TV and General TV Inspectors performed their jobs under similar working conditions?

Answer to Interrogatory No. 8:

8. No.

Plaintiff's Exhibit 1.

Interrogatory No. 9:

9. If the answer to Interrogatory No. 8 is "no," explain the difference.

Answer to Interrogatory No. 9:

9. In accordance with past practice under current and predecessor contracts, women were assigned to inspection activities on the day and/or afternoon shifts. Some of them worked steady days or steady afternoon shifts, while others rotated between the day and afternoon shifts on a bi-weekly cycle. To a large degree these assignments were made according to the desires of individual employees.

The men, on the other hand, worked a steady night shift and never worked either the day or afternoon shifts. This practice began about 1930 when machine production was substituted for hand production in the Forming department. Two shifts of inspection (day and afternoon shifts) could not keep pace with the three shifts of forming production. By New York State Law, women were prohibited from working the night shift. Thus, men were diverted from other activities in order to man this essential operation on the night shift, and their wage rates were not cut.

It was not practicable to reduce the rates of the men transferred to the steady night shift, for they could earn higher rates on other jobs, and in addition could get substantially more hours of work, and thus earn substantially more money. The work was not only less remunerative, but enjoyed less prestige.

The men on the steady night shift were able to and did more physical work, such as lifting and carrying. They

also required less relief time than did the women on day or afternoon shifts.

In addition, they were working the least desirable of all working hours, and working them on a steady shift, without rotating shifts.

At that time there was no general shift differential. It did not come into existence in these plants until the advent of the union about 1944.

The working conditions of the men were thus substantially different than those of the women when this steady night shift differential was established.

Interrogatory No. 10:

10. If defendant pays shift differentials—

    (a) What are they?

    (b) How long have they been in effect?

    (c) Are they set by union contract?

    (d) Do they apply to all departments in all plants of Corning Glass Works? If not to all, list the departments and plants to which they do, or do not, apply.

Answer to Interrogatory No. 10:

10. (a) Rotating and/or non-rotating evening shifts at 6¢ per hour; rotating night shifts at 8¢ per hour; non-rotating night shifts at 12¢ per hour. Aforementioned supplemental escalating differential applicable only to non-rotating night shift inspectors. The amount of this supplement varies:

Plaintiff's Exhibit 1.

	Class C	*Class B*
1st 30 days	$ .04	$ .04
2-4 months	.08	.04
5-10 months	.125	.045
11-16 months	.165*	.085*
17-22 months	.165*	.135*
23 or more months	.165*	.195*

*Includes merit increase increment(s).

(b) The supplemental differential cited above existed from 1930 on with the size varying from time to time as a result of the agreed upon rates applicable to the job classifications:

	Inspector C *Max. Differential*	*Inspector B* *Max. Differential*
1945	$.14	$.14
1946—64	.16	.18
1965	.165	.19
1966	.165	.195
1967	.165	.195

Since January 20, 1944, they have been established by Union contract. The other differentials were initiated as part of the first contract between the parties dated January 20, 1944. Subsequent contracts revised and improved these differentials. The existing formulae have remained unchanged since the December 8, 1958 contract.

Plaintiff's Exhibit 1.

Shift Differential		*Date Effective*
$.03 Non-Rotating Afternoon Shift) .05 Non-Rotating Night Shift)		January 20, 1944
$.04 Afternoon Shift) .06 Night Shift)	Rotating or Non-Rotating	January 20, 1945
$.04 Afternoon Shift) .06 Night Shift)	Non-Rotating	January 20, 1946
.02 Afternoon Shift) .03 Night Shift)	Rotating	
Night Shift, Non-Rotating changed $.10		October 20, 1947
$.04 Evening Shift) .06 Night Shift)	Rotating changed	November 3, 1952
$.06 Afternoon Shift	Rotating or Non-Rotating	
.08 Night Shift .12 Night Shift	Rotating Non-Rotating	December 8, 1958

(c) Yes, as described above.

(d) All except the supplemental differentials, as cited above, apply throughout the establishments covered by this suit.

Interrogatory No. 11:

11. Since June 11, 1964, have there been departments staffed exclusively by men or exclusively by women?

Answer to Interrogatory No. 11:

11. In the alleged establishment covered by this suit there are some departments which since November 1, 1964 have been staffed exclusively by men or women. However, we

should point out that this is not necessarily a static condition, but that it can change and has changed from time to time as a result of movement of employees by promotion, transfer or bumping by seniority.

Interrogatory No. 12:

12. If the answer to Interrogatory No. 11 is "yes," answer the following, with dates:

    (a) Which departments and in which plants?

    (b) Which departments operate a third shift?

    (c) What shift differential, if any, has been paid for the third shift?

    (d) Is the base hourly rate for employees on the non-rotating third shift the same as for the first and second shift employees of equivalent or comparable seniority?

Answer to Interrogatory No. 12:

(a) and (b) The data requested are set forth in Exhibit D attached hereto and made part hereof.

(c) Shift differentials have been paid in accordance with the contract.

(d) Yes.

Interrogatory No. 13:

13. During World War II did defendant replace men inspectors with women inspectors?

Plaintiff's Exhibit 1.

Answer to Interrogatory No. 13:

13. Defendant did not replace men with women inspectors. As manpower became tight women were assigned to night inspection work, under a special state permit, but they did not perform the same duties that men on nights had performed.

Interrogatory No. 14:

14. If the answer to Interrogatory No. 13 is "yes," answer the following:

(a) Did the women receive the same base hourly rate as the men with equivalent or comparable seniority?

(b) Were the inspectors on the first, second and third shifts at any time during this period composed entirely of women?

(c) If the answer to (b) is "yes," did the women on the third shift receive the same base hourly rate as the women of equivalent or comparable seniority on the first and second shifts?

Answer to Interrogatory No. 14:

14. (a) No.

(b) No.

(c) Not applicable.

Interrogatory No. 15:

15. On June 11, 1964, did defendant maintain a separate seniority list for men and women inspectors?

Plaintiff's Exhibit 1.

Answer to Interrogatory No. 15:

15. The Company did not maintain separate seniority lists of male and female inspectors as such. The Company did maintain separate seniority lists for men and women pursuant to long established union-management understandings and practices.

Interrogatory No. 16:

16. If the answer to Interrogatory No. 15 is "yes," state how long these separate lists were maintained.

Answer to Interrogatory No. 16:

16. From about 1944 until May 31, 1966.

* * *

Interrogatory No. 18:

18. If the answer to Interrogatory No. 17 is "no," when were the separate lists discontinued?

(a) If discontinued, were women inspectors of greater seniority who applied for third shift work able immediately to displace men inspectors on the third shift of the same class, but of lesser seniority?

Answer to Interrogatory No. 18:

18. On May 31, 1966 the seniority lists were combined.

(a) Beginning with June 1, 1966, women inspectors were able to use seniority to take jobs on the steady third shift, and many did so, under union-management agreed upon seniority rules and

practices when vacancies and reductions in force occurred. The rules for application of seniority were not changed.

Interrogatory No. 19:

19. Does defendant have a job evaluation plan?

Answer to Interrogatory No. 19:

19. Defendant has two different job evaluation plans.

Interrogatory No. 20:

20. If the answer to Interrogatory No. 19 is "yes," at how many points are the following jobs evaluated.

(a) Class C Inspector on the first and second shift?

(b) Class C Inspector on the third shift?

(c) Class B Inspector on the first and second shift?

(d) Class B Inspector on the third shift?

(e) TV Inspector on the first and second shift?

(f) TV Inspector on the third shift?

(g) General TV Inspector on the first and second shifts?

(h) General TV Inspector on the third shift?

Answer to Interrogatory No. 20:

20. Under either of the above two evaluation plans the evaluated points do not reflect a difference for any given job as it occurs on the various shifts.

Plaintiff's Exhibit 1.

	Evaluated Points	
	S, J & H Plan (1)	*CGW Plan (2)*
(a) Inspector Class C		
1st Shift	230	930
2nd Shift	230	930
(b) 3rd Shift	230	930
(c) Inspector Class B		
1st Shift	345	975
2nd Shift	345	975
(d) 3rd Shift	345	975
(e) TV Inspector		
1st Shift	230	930
2nd Shift	230	930
(f) 3rd Shift	230	930
(g) General TV Inspector		
1st Shift	345	980
2nd Shift	345	980
(h) 3rd Shift	345	980

(1) Obsolete plan but still in effect in Corning, New York.

(2) A new plan developed by the company, in effect in 24 branch plants, which has been presented to Local #1000 of the American Flint Glass Workers Union in Corning on six separate occasions.

Interrogatory No. 21:

21. If the answer to Interrogatory No. 19 is "yes,"—

(a) How long has the job evaluation plan been in use?

(b) Was it adopted by collective bargaining agreement, or unilaterally by defendant?

Plaintiff's Exhibit 1.

Answer to Interrogatory No. 21:

21. The defendant has two job evaluation plans.

The earliest of these plans, which we designate as the "S, J & H Plan" (Stevenson, Jordan & Harrison), was installed department by department in Corning starting in 1946, each installation being subject to the collective bargaining process. The plan is still not in effect in some departments in Corning, nor is there any agreement or proposal to extend it to these departments.

The "S, J & H Plan" has long been recognized to have deficiencies:

1. A significant number of jobs were never brought under the plan.
2. A number of jobs were, subsequent to installation, removed from the plan.
3. The descriptions were neglected and permitted to get out of date except when the union felt a rate increase could be brought about.
4. The system did not provide for measurement of Physical Effort.
5. The degree definitions under each factor were ambiguous.
6. The plan failed to respond with rate increases on jobs which were significantly changed.

The second plan, which is designated as the CGW Plan, was developed over a period of several years starting in 1957 as a result of recognition within the company that the S, J & H Plan was an unsatisfactory tool, and the growing

dissatisfaction of the union with the S, J & H Plan for some of the reasons listed above. The new plan was first installed in 1960 in a branch plant. It has been placed in operation in 24 of the company's branch plants of which 21 are AFGWU organized. In the December, 1962 negotiations, the company made its first official offer of the CGW Plan to Local #1000 (Corning) of the AFGWU and was rejected as it has been in five subsequent presentations.

Officially the S, J & H Plan is still in effect in Corning, New York, because the Union has thus far refused to agree to the modern CGW plan. However the company fully endorses the universal use of the CGW Plan throughout the company as the soundest and fairest way to maintain equitable rate relationships on hourly paid jobs. It is ready to install the CGW Plan in Corning, and it has completed new descriptions and evaluations under the plan.

s/ SETH J. McKIBBIN.

• • •

PLAINTIFF'S EXHIBIT 4.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES, SET NO. 1

EXHIBIT D

[Responsive to Interrogatory No. 12]

Dept. No.	*Dept.*	*Men*	*Women*	*Third Shift*
"A" FACTORY				
0100	Cleaners	5	–0–	No
0101	Hand Blown Prod.	114	–0–	No
0103	Automatic Prod.	75	–0–	Yes
0104	Automatic Flat Prod.	52	–0–	Yes
0106	Maintenance	25	–0–	Yes
0107	Mold Room	21	–0–	No
0902	Plant Mfg. Eng.	4	–0–	No
1502	Melting	17	–0–	Yes
1503	Lehrs	4	–0–	Yes
1602	Forebays & Forehearth	13	–0–	Yes
1702	Mixing	18	–0–	Yes
1704	Trades	100	–0–	No
1705	Machine Shop	67	–0–	No
1801	Pack, Stores & Shipping	12	–0–	Yes
"B" & "C" FACTORY				
2001	Trades	17	–0–	No
2002	Equip. Maintenance	11	–0–	Yes
2007	Mold Maintenance	5	–0–	No
2009	Clean & Elev. Oper.	7	–0–	No
2205	Lehrs	6	–0–	Yes
2302	Hand Blown	68	–0–	Yes
2402	Hand Press	19	–0–	Yes
2502	Automatics	18	–0–	Yes
2801	Melting	53	–0–	Yes
2901	Mixing	12	–0–	Yes
2906	Shipping	3	–0–	No

Plaintiff's Exhibit 4.

Dept. No.	*Dept.*	*Men*	*Women*	*Third Shift*
PRESSWARE				
1801	Melting	15	–0–	Yes
1802	Melting	17	–0–	Yes
1803	Melting	4	–0–	Yes
1807	Melting	6	–0–	Yes
1808	Melting	5	–0–	Yes
1809	Melting	6	–0–	Yes
2405	P. W. West Forming	74	–0–	Yes
2704	P. W. Forming	52	–0–	Yes
2705	P. W. Forming	181	–0–	Yes
4303	Rectangular Color Dev. & Finishing	10	–0–	Yes
6101	Trades & Plant	104	–0–	Yes
6105	Services	1	–0–	No
6108	Services	2	–0–	Yes
6202	Mold Shop	31	–0–	Yes
6303	Feeder Maintenance	17	–0–	Yes
6308	Feeder Maintenance	6	–0–	Yes
6404	Machine Shop	14	–0–	Yes
6707	Finishing Maintenance	6	–0–	Yes
6708	Finishing Maintenance	1	–0–	No
7404	Storeroom	5	–0–	Yes
9101	Shipping	23	–0–	Yes

PLAINTIFF'S EXHIBIT 6.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES, SET NO. 2, TO THE EXTENT NOT SUBJECT TO OBJECTIONS NOW PENDING

* * *

Interrogatory I (d):

(d) Answer 1(b) (8) refers to a "supplemental escalating shift differential to inspectors who worked a nonrotating night shift."

(1) How long has the term "supplemental escalating shift differential" been in use by defendant?

(2) Is this term in the union contracts, and, if so, identify the provision in the first contract in which it was used, and in subsequent contracts.

(3) Is this term used in any documents of Corning Glass Works, New York? If so, identify by name, date, and custodian.

(4) Is this "supplemental escalating shift differential" in addition to, or included in, the "base hourly rate of pay" given for the night shift inspectors in answer 1(b)(6)?

Plaintiff's Exhibit 6.

Answer to Interrogatory I(d):

(1) This is merely a descriptive term used in answering Plaintiff's Interrogatories, Set No. 1. It is not otherwise used.

(2) No.

(3) No.

(4) Included.

• • •

Interrogatory IV (c):

(c) Since June 1, 1966, how many women inspectors have gotten onto the third shift by bidding? By bumping?

Answer to Interrogatory IV (c):

124 different women:

122 by bidding 206 times
25 by interplant bumping 34 times

Note: A woman may bid to take the job initially, leave it later and return to it still later via either another bid or a bump.

Interrogatory IV(d):

(d) Since June 1, 1966, how many vacancies have occurred on the night shift?

Answer to Interrogatory IV(d):

By stipulation, this refers only to inspectors. There were approximately 296 such openings.

Plaintiff's Exhibit 6.

Interrogatory IV(e):

(e) On June 1, 1966, how many men inspectors were on the night shift and how many had been inspectors for a shorter length of time than the most senior woman inspector? What was the average length of time the men had been employed as inspectors?

Answer to Interrogatory IV(e):

By stipulation, this refers only to the number of men inspectors on night inspection jobs on June 1, 1966. On that date there were 101.

Interrogatory V:

Answer 5 states that from June 1, 1966, to April 14, 1967, 101 women for some part of the period used seniority to take steady night shift jobs and 24 men took day or afternoon shift jobs.

(a) As to the 24 men state: (1) their names; (2) the date each went on the day or afternoon shift; (3) how long each had been employed at defendant's plant; (4) how long each had been an inspector; (5) whether seniority was used to get on the day or afternoon shift; (6) their rates or pay prior to and after the transfer; (7) how much actual reduction in pay each suffered; (8) how long each stayed on the day or afternoon shift; (9) to what job and rate each transferred from the day or afternoon shift if no longer there.

Answer to Interrogatory V(a):

In addition, there is attached hereto as Exhibit I a document of two pages giving the detailed date requested in

answer to this interrogatory. In each instance cited the employee used his seniority to take the job.

• • •

Interrogatory X:

(a) Answer 10 refers to a "supplemental escalating differential applicable only to non-rotating night shift inspectors." Is this the same differential referred to in answer 1(b)(8)? Do the answers to Interrogatory I(d) in Set No. 2 of plaintiff's interrogatories apply to it?

(b) Answer 10 refers to rates established by union contracts of January 20, 1944, and December 8, 1958, and contracts in between. Quote or attach copies of these contracts and specify which provision of the contracts established the rates. If the rates are set forth in schedules separate from the contracts, quote or attach copies of the schedules. Name the person who has custody of these contracts and schedules and is best qualified to explain them.

Answer to Interrogatory X:

(a) Yes, to both questions.

(b) Copies of the contracts have already been furnished to Mr. LaRuffa. See our answer to Interrogatory I(b).

• • •

s/ SETH J. McKIBBIN.

PLAINTIFF'S EXHIBIT 13.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

EXHIBIT I TO DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES, SET NO. 2.

[Responsive to Interrogatory No. V]

Emp. #	Name	On Day Inspect.	Service Date	1st Date Inspec.	From Job	From $ Rate	Insp. $ Rate	$ Diff.	Off Day Inspect.	Job	Title
03882	R. L. Baker	8/10	04-20-66	02-28-68	Lay-off		2.37	+2.37	8/10	1036	Utility Worker
05558	G. L. Bebout	8/10	01-05-66	02-27-68	Lay-off		2.37	+2.37	8/10	1036	Utility Worker
08966	G. E. Bohart	8/18	03-14-68	04-22-68	1222	2.37	2.37	—	8/19	1036	Utility Worker
13267	R. A. Button	6/26	04-24-66	06-21-66	1113	2.375	2.18	— .195	6/32		Leave of Absence
13943	A. R. Cantineri	8/17	04-06-66	04-19-68	1036	2.33	2.33	—	8/21		Ill-health
13945	M. J. Cantineri	8/21	07-06-65	05-13-68	1036	2.42	2.37	— .06			
18404	C. E. Cooper	8/04	10-07-65	01-15-68	5918	2.46	2.37	— .09	8/04		Unreliable
20354	M. R. Cummings	8/04	01-03-64	01-19-68	2752	2.51	2.37	— .14	8/09	2752	TV Smoother & Polish.
20770	J. P. Czado	8/06	09-07-65	02-01-68	Lay-off		2.37	+2.37	8/06	1036	Utility Worker
21476	D. W. Davies	6/25	06-13-66	06-13-66	New Hire		2.14	+2.14	6/26	1217	Sweeper & Cleaner
26443	R. N. Eddy	8/05	11-18-63	01-22-68	1036	2.46	2.37	— .09	8/05	5918	Laborer
29290	R. G. Fenton	8/23	05-15-68	05-29-68	2331	2.49	2.29	— .20			
31024	G. A. Forsberg	6/26	06-10-66	06-21-66	1036	2.18	2.14	— .04	6/26	1222	Cleaner
34428	G. A. Giannini	7/16	05-01-42	01-07-46	4671	2.475	2.28	— .195	7/21	4671	Gen. TV Insp. (N)
37300	A. E. Gridley	6/26	04-11-66	05-02-66	1036	2.22	2.22	—	6/37	1222	Cleaner
37374	M. P. Griffin	8/18	03-30-68	04-22-68	1036	2.33	2.33	—	8/19	1036	Utility Worker
37417	D. R. Grist	6/26	04-11-66	05-16-66	2355	2.22	2.22	—	6/37	1006	Standard Shop Boy
40467	J. R. Harp	8/11	04-19-66	02-26-68	1036	2.46	2.37	— .09	8/12	2331	Automatic Boy
41969	W. R. Helms	7/21	01-17-52	08-22-56	Disability		2.28	+2.28	7/21	4671	Gen. TV Insp. (N)
		7/28	01-17-52	08-22-56	4671	2.475	2.28	— .195	7/28	1036	Utility Worker

Plaintiff's Exhibit 13.

Emp. #	Name	Inspect.	Date	Inspec.	Job	$ Rate	$ Rate	$ Diff.	Inspect.	Job	Title
47169	R. P. Iverson	8/04	09-02-64	01-15-68	2752	2.575	2.37	— .205	8/05	4672	Gen. TV Insp.
		8/06	09-02-64	01-15-68	4658	2.37	2.37	—	8/06	2752	TV Smoother & Polish.
51527	G. E. Knapp	8/04	09-03-65	11-20-56	5918	2.46	2.37	— .09	8/05	1020	Operative Multiform
53522	G. N. Lamb	8/23	05-15-68	05-27-68	2180	2.33	2.29	— .04			
54662	R. R. Learn	8/17	01-04-66	04-19-68	2752	2.575	2.37	— .205	8/18	1036	Utility Worker
54719	C. E. LeBarron	6/52	05-18-66	12-21-66	1113	2.485	2.28	— .205	6/52	1036	Utility Worker
55575	P. E. Lewis	7/22	03-12-52	06-23-52	1409	2.365	2.28	— .085	7/24	1036	Utility Worker
55910	E. D. Lind	8/05	01-03-64	01-29-65	1036	2.46	2.37	— .09	8/06	1036	Utility Worker
57274	C. D. Lovell	8/03	10-04-65	01-15-68	4094	2.46	2.37	— .09	8/03		Lay-off
59266	J. E. Mann	8/05	09-02-65	01-26-68	Lay-off		2.37	+2.37	8/07	3541	Machine Finishing
65907	G. L. Morse	6/52	05-19-66	12-21-66	1113	2.525	2.28	— .245	7/1		Lay-off
66103	R. L. Moore	7/1	05-09-66	12-30-66	1036	2.485	2.28	— .205	7/1	1036	Utility Worker
66267	F. C. Morton	7/27	10-05-50	07-20-53	4671	2.475	2.28	— .195	7/33	4671	Gen. TV Insp. (N)
67026	D. P. Murphy	6/26	09-03-59	05-02-66	1377	2.305	2.22	— .085	7/11	1036	Utility Worker
67550	G. L. Nash	6/52	05-16-66	12-21-66	1036	2.365	2.28	— .085	7/01	1036	Utility Worker
71447	C. D. Parker	6/52	04-26-66	12-20-66	1113	2.485	2.28	— .205	7/01	1036	Utility Worker
75762	E. E. Raub	8/04	09-02-65	01-15-68	1036	2.46	2.37	— .09	8/05	4549	Inspector Operative
75763	I. E. Raub	8/04	08-25-65	01-15-68	1036	2.46	2.37	— .09	8/05	1051	Alum. Forming Oper.
77256	S. L. Riley	6/52	05-16-66	12-21-66	1378	2.325	2.28	— .045	7/01	1036	Utility Worker
79095	D. W. Rumberger	8/6	08-27-65	02-16-66	Lay-off		2.37	+2.37	8/09	4671	Gen. TV Insp. (N)
80334	C. E. Saxbury	6/52	09-13-57	12-20-66	1113	2.525	2.28	— .245	7/01	1036	Utility Worker
84334	W. Skelly	7/1	05-12-66	12-27-66	1036	2.325	2.28	— .045	7/01	1036	Utility Worker
84953	R. L. Smith	6/26	12-31-65	06-02-66	1377	2.265	2.22	— .045	6/38	1036	Utility Worker
86123	D. E. Stabley	7/17	11-06-51	05-18-60	4671	2.475	2.28	— .195	7/17	1409	Common Laborer
88630	L. B. Swan	6/52	05-16-66	12-20-66	1113	2.485	2.28	— .205	7/01	1036	Utility Worker
89911	W. S. Tompkins	8/10	04-18-66	02-26-68	2251	2.46	2.37	— .09	8/11	1036	Utility Worker
91570	R. L. Tyler	8/04	07-02-65	01-16-68	1036	2.42	2.37	— .05	8/05	4549	Inspector Operative
92487	L. R. Van Pelt	7/01	05-16-66	12-20-66	1113	2.485	2.28	— .205	7/01	1036	Utility Worker
93519	D. E. Wainwright	8/04	02-12-64	01-17-68	2180	2.42	2.37	— .05	8/06	1036	Utility Worker
95166	R. H. Webster	7/01	05-16-66	12-28-66	1343	2.20	2.28	+ .08	7/02	3104	Operator Tube Draw.
95741	G. W. Welty	7/01	05-16-66	12-27-66	1036	2.325	2.28	— .045	7/02	1505	Tank Filler
96355	D. E. Wheaton	6/36	02-28-52	09-14-59	Disability		2.22	+2.22	6/40	4815	Control Inspector TV
97721	K. E. Wilson	6/52	05-12-66	12-20-66	1036	2.325	2.28	— .045	7/01	1036	Utility Worker
99586	W. L. Youngs	6/52	05-18-66	12-20-66	1036	2.325	2.28	— .045	7/01	1505	Tank Filler

PLAINTIFF'S EXHIBIT 27.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEFENDANT'S SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES, SET NO. 2.

• • •

Interrogatory III (e), Answer III(a) states that "[t]he inspector jobs on the steady night shift are higher rated jobs than the corresponding activities on the day and/or evening shifts" due to "the less desirable hours of work, inconvenience of working steady nights, etc." Exactly how and at what rate has defendant compensated steady night shift employees, other than inspectors, for the less desirable hours of work and inconvenience, etc.?

Answer to Interrogatory III (e):

By shift differentials negotiated with the Union as described in the answer to Interrogatory No. 10 of Defendant's Answers to Plaintiff's Interrogatories, Set No. 1.

• • •

SETH J. McKIBBIN

SETH J. MCKIBBIN

• • •

PLAINTIFF'S EXHIBIT 30.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY GROUP NUMBER CONVERSION TABLE

IRREGULAR SCHEDULE			*REGULAR SCHEDULE*		
Present Group Number		*New Group Number*	*Present Group Number*		*New Group Number*
Male	*Female*		*Male*	*Female*	
6.1A		3.1		1, 2, & 3A	1
6.2A		3.2		4 & 5A	2
7.1A		4.1		6A	3
7.2A		4.2	1	7A	4
7.3A		4.0	2	8A	5
8.1A		5.2	3	9A	6
			4	10A	7

3.1 & Above Add 3 to present Group Number.

5 & above Add 3 to present Group Number.

AJA,Jr/wd
6-10-64

• • •

PLAINTIFF'S EXHIBIT 32.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

CONVERSION SCHEDULE

Cancels sheet dated November 19, 1962
Effective June 11, 1964

REGULAR SCHEDULE

Grp. #	*Trainee*	*Minimum*	*Maximum*
1			1.975
2	1.975		2.015
3	1.975		2.055
4	2.015		2.095
5	2.015		2.135
6	2.015		2.185
7	2.015	2.055	2.235
8	2.015	2.095	2.285
9	2.015	2.135	2.345
10	2.055	2.185	2.40
11	2.095	2.235	2.475
12	2.135	2.285	2.545
13	2.185	2.345	2.63
14	2.235	2.40	2.69
15	2.285	2.475	2.765
16	2.345	2.545	2.845
17	2.40	2.63	2.925
18	2.475	2.69	2.995
19	2.545	2.765	3.085
20	2.63	2.845	3.18
21	2.69	2.925	3.275
22	2.765	2.995	3.36
23	2.845	3.085	3.465
24	2.925	3.18	3.565
25	2.995	3.275	3.675
26	3.085	3.36	3.785
27	3.18	3.465	3.90

[1] **PLAINTIFF'S EXHIBIT 33.**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEPOSITION OF EDWARD W. NOBLE.

[November 6, 1968]

Appearances:

Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, U. S. Department of Labor, Washington, D. C., on behalf of Plaintiff.

Francis V. LaRuffa, Esq., Chief Trial Attorney, U. S. Department of Labor, 341-9th Avenue, New York, N. Y., on behalf of Plaintiff.

Scott F. Zimmerman, Esq., Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania, on behalf of Defendant.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

[3] PROCEEDINGS

Whereupon,

EDWARD W. NOBLE, was called as a witness by Counsel for the plaintiff, and testified as follows:

Direct Examination by Mrs. Cappello.

By Mrs. Cappello:

Q. Would you state your name and address, for the record, please? A. Edward W. Noble, 120 Circle Drive, Bath, New York.

Q. Are you employed by Corning Glass works? A. Yes, I am.

Q. How long have you been employed by them? A. Twenty seven years.

Q. Would you state the positions that you have held and the approximate periods of time that you held them? A. Yes, sir. This is going to be kind of memory—

Q. Sure— A. Approximately two years as an hourly employee in miscellaneous manufacturing activities in the Pilot plant for manufacturing optical glass here in Corning. The next several years involved in sales—service work, sales correspondence and the like, and since about 1945 involved in various industrial engineering [4] until my present employment as manager of job evaluation.

Q. Mr. Noble—

Mr. LaRuffa: Excuse me, what is your present position?

The Witness: Manager of job evaluation.

• • •

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

By Mrs. Cappello:

[11] Q. Would you now describe the working conditions of these inspectors? A. Well, again, when we talk work conditions, I am not just sure what you mean by working conditions?

Q. What do you mean when you evaluate a job? A. What we are considering in working conditions is the weight that the people have to lift, for example in other words we are considering the hazard, we would consider the possible hazards of strain, sprains, cuts, bruises and those things that would be considered basically an injury, and we are also considering the surrounding conditions or degree of unpleasantness that exists with these jobs. In other words, does the job require exposure to heat, noise, fumes, dust and things of this sort. Now, these jobs—the most part are in what we would consider a fairly typical factory condition. There is some heat, there is some noise and there is some fumes, but we would consider it as pretty much an average or a normal factory condition.

• • •

[12] Q. Do these jobs vary from shift to shift? A. Varied as far as evaluation plan is concerned, or varied—

Q. Well, as you know, how these jobs are performed, do they vary from shift to shift? A. Today I don't think there is very little difference from shift to shift.

• • •

By Mrs. Cappello:

[22] Q. Do you know if men regard inspection work as lacking in prestige? A. I have heard that stated, yes.

Q. Do you know why? A. Yes. They consider it female work.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

Mr. Zimmerman: It is your understanding, any way?

The Witness: That's right.

• • •

By Mrs. Cappello:

[40] Q. Have you ever been asked to get out new jo descriptions for these jobs? A. Our inspection classific tions have remained fairly constant over the years, Mr Cappello.

Q. So you believe your supervisors out in the plan feel they are accurate? A. Yes.

Q. Why are working conditions omitted from M a N—Exhibits M and N? A. M and N?

Q. Yes? A. Well, I think you will find that under o S J and H System, if the working conditions were con dered typical factory conditions, no award was given.

Q. The working conditions on the others are graded G; is that correct? A. I see that statement.

Q. Well, would that be true of M and N? A. Yes. far as I am concerned, apparently this was the techni that some of the analysts used to just indicate—

[41] Mr. Zimmerman: Which exhibit are you look at?

The Witness: On this particular one, this is i this is exhibit—

By Mrs. Cappello:

Q. All of them but M and N have working condit graded as G; is that right? A. Yes, that is correct. I couldn't testify as to why it was put on there, except that has no award, as such.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

Q. Well, what do you consider working conditions under the SJ and H plan? A. Working conditions are twofold. One is surrounding conditions, which are the unpleasantness, degree of unpleasantness, and it would be the severity and frequency of exposure to such things dust, heat, noise, fumes, wetness, things of that sort.

Q. Is the time of day work considered? A. No, it is not, and we also have the hazard conditions as another consideration under working conditions, and there again it is the frequency and type possible injury or hazard, such as cuts, burns, bruises, and things of this sort.

• • •

By Mrs. Cappello:

[48] Q. Now, I would like to ask you some questions about the S, J and H Plan, Mr. Noble, were the jobs of Class C, Class B, T. V. and General T. V. Inspectors evaluated at different points on the different shifts under this plan? A. No—well, wait a minute they were—yes, Class C had a different title than Class B, if that is what you mean, the total points—

Q. No, Class C jobs on all three shifts, was it evaluated? A. I am sorry, I misunderstood your question. It was the same on all three shifts.

Q. And this applies to all of those jobs? A. Right.

[49] Q. Did you bring with you the analysis sheets on these jobs, that is, number three?

Mrs. Cappello: Please mark as Exhibit E to Mr. Noble's deposition the summary sheet for "A" factory.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit E.)

Mrs. Cappello: Would you please mark as Exhibit F to Mr. Noble's deposition the summary sheet for "B" and "C" factory, department, pressware inspection, finishing, and packing.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit F.)

Mrs. Cappello: Would you please mark as Exhibit G to Mr. Noble's deposition the summary sheet under the SJ and H plan in pressware.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit G.)

Mrs. Cappello: Would you please mark as Exhibit H to Mr. Noble's deposition the analysis sheets under SJ and H plan for Class B—let's just call them analysis records. This consists of thirteen pages.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit H.)

By Mrs. Cappello:

Q. Using these exhibits, Mr. Noble, would you please state what the working conditions are for the day, afternoon, and night Class C, Class B, TV, and general TV inspectors? A. From this material, Mrs. Cappello, it is impossible to identify the working conditions, because it is not specified [50] as—other than some of these things right in here.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

Now, we have to understand what these were, and I want to clarify the record.

Q. Are you referring to the analysis— A. I am referring to the analysis record.

Q. Exhibit H? A. Right, these were preliminary work sheets that were subsequently summarized, and included on the descriptions that have been in previous exhibits, and these were never typed up, for example, and these were—when we did our original analysis work.

Q. These are the job descriptions that were Exhibits K to V to the second set Interrogatories? A. Right. The purpose of this was—the analyst went out into the shop area, and looked at the work and accumulated this information, which was subsequently transferred to a description. Now, many of these—and I haven't gone through all of these—would have indicated that many of the plants had a number of different types of inspection. In other words, an inspector might be involved only with the—with a pressed ware item in this location, another he might be involved with an automatic item. We have to recognize at the time this system was in the process of being developed or applied, we had many, many types of inspection, and it wasn't until we got into a formal job evaluation that we tended to [51] characterize them in basically two levels, B and C. We didn't continue the same.

Q. These analysis records are dated 1944 and 1943? A. I think most of them are dated 1944. Right. Here is one 1943.

Q. And, generally the working conditions were designated as what? A. As good.

Plaintiff's Exhibit 33.
Deposition of Edward W. Noble—Direct.

Q. And, what working conditions were considered under the SJ and H plan? A. Well, as I indicated to you, these would be a typical—what we considered a typical factory condition to be given in category—there would be some noise and some heat and some fumes, but not of a sufficient level of magnitude to justify giving the point awards.

Q. Is time of day considered a working condition under these? A. No, not under this.

Q. And, it is not considered a working condition under the CGW plan, either? A. No, it is not.

Q. Looking at the plan itself, the SJ and H plan, Mr. Noble, which is Exhibit D to your Interrogatory, and turning to page twelve—thirteen, does it show down at the bottom how you arrive at the rate for a job? [52] A. It shows this, and, to the best of my knowledge, this was never used in applying the system. This was used in the preliminary stages for developing some tentative schedules, and some preliminary work. The first wages that were paid under the system was in 1944, or 1946, I believe, at which time we had the schedule that is part of the exhibit. This approach for translating points into money, to the best of my knowledge, was never used for any payment of wages.

Mrs. Cappello: Off the record.

(Discussion off the record.)

By Mrs. Cappello:

Q. Looking at page thirty, Mr. Noble, of the SJ and H plan, does that provide for multiplying the rating factor of the job by the base rate male and the base rate female? A. As I previously testified, this was provided, and you will

notice by our—some of these sheets, we did have this on here, and it was never filled in, and as I indicated to you, this rating factor—this means of converting total points into a list was used primarily for development purposes, and to the best of my knowledge, was never used as a wage payment as such.

• • •

By Mrs. Cappello:

[53] Q. Under the CGW plan, what are the working conditions of inspectors considered to be? A. Basically the same as I described.

Q. Same as under the SJ and H plan? A. Right, the situation has not, basically, changed.

Q. And, time of day is not considered a working condition? A. It is not.

• • •

PLAINTIFF'S EXHIBIT 34.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

EVALUATION MANUAL

Hourly Jobs

SECTION I
Guide for Describing and Evaluating

Copyright 1961
CORNING GLASS WORKS
Corning, New York

• • •

The basis for evaluating a job is the description and analysis of the job. The primary purpose of these is to obtain information enabling the evaluator to establish an equitable rate of pay and to record the basis for that rate of pay.

An on-the-scene survey should be made of each job to secure information about each of the eleven factors, as called for on the Job Analysis Data Sheet (Form Q-38). A sample of this form will be found as the last sheet in this introduction. This sheet should serve as both a check sheet and a work sheet for recording specific job information and for development of the job description, and finally, for the job evaluation itself.

• • •

As mentioned earlier, this job evaluation system covers eleven factors, each of which is described in detail on the

following pages of this manual. Each factor is evaluated by comparing the job in question with the appropriate bench mark jobs, except for one factor (Responsibility for Direction of Others) in which case a calculation must be made to determine the points.

The steps in the evaluation process are:

1. Thoroughly understand the job to be evaluated. This requires that you have prepared a complete, accurate Job Analysis Data Sheet and a well-written and approved Job Description.
2. Analyze the job, considering one factor at a time and follow the specific instructions for each factor. Make a preliminary decision concerning the appropriate degree for each factor through the aid of the degree definitions.

• • •

GROUND RULES

• • •

2. To maintain equity of rate relationships between jobs, each job will be reviewed once a year to determine if a change has occurred which would change the evaluated points. Any change occurring during the year should be recognized by a re-evaluation.

• • •

FACTOR 10

SURROUNDINGS

Definition

This factor measures the degree to which the physical conditions surrounding a job are disagreeable. Consideration is given to:

1. The nature and degree of the unpleasant conditions.
2. The amount of time the employe is exposed to these conditions during the work day.

Discussion

Although the company attempts to provide favorable working conditions for its employes, the nature of some jobs makes them less desirable than others. This factor provides for awarding additional points in such cases. The conditions specifically referred to are dust, fumes and smoke, which make it necessary to wear uncomfortable safety equipment, and heat, glare, wetness, noise, vibration, grease, oil and exposure to all outside weather conditions.

Identify the conditions under which the job is performed and compare with the bench mark jobs on the following page to determine the points to be assigned. Do not consider the effect of summer and winter or night and day differences on the working conditions, but evaluate on a year around average condition.

• • •

FACTOR 11

HAZARDS

Definition

This factor is a measure of the hazards of the job to which the employe is regularly exposed. Consideration is given to:

1. The degree to which unguarded hazards exist.
2. The frequency of exposure to the hazards.
3. The type and degree of possible injury.

Plaintiff's Exhibit 34.

Discussion

The company attempts to provide safe conditions on every job. Moving machinery such as gears, belts, and reciprocating parts have been covered with shields wherever practical; dust collection systems have been provided; lifting devices have been provided; and protective clothing and other safety devices have been furnished. Despite these efforts to protect the employe, there still remain hazards to which the employe is exposed. This factor provides the means of recognizing the varying degrees of hazard in a job.

It must be assumed that the employe is a normal individual adapted to the conditions of the specific job, and that he is exercising reasonable care and observing all safety regulations.

In evaluating hazards, consider only those that remain unguarded; that is, those which the employe must use his ingenuity and care to avoid. A shielded gear train is no longer a real danger, but hot power lines constitute a hazard to the electrician.

To determine the award for this factor consider the frequency of exposure to the hazardous condition, and the type and degree of possible injury (such as cuts, burns, strains, sprains, fracture) and compare with the bench marks on the following page.

• • •

PLAINTIFF'S EXHIBIT 36.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY JOB EVALUATION

R-25 Job No.: 80-1353

Location: "A" Factory Typed: 3-10-64

Job Title: Inspector Class C Effective:

Analyst: R. L. Lewis

DESCRIPTION:

Inspects a limited variety of ware for specified glass quality, shop, finishing, and dimensional defects, using a limited variety of gauges and working according to standard procedures. This work includes such duties as:

Inspects ware visually for such defects as stones, seeds, chill wrinkles, shear marks, blisters, and for improper grinding, sandblasting, beading, lipping, etc. Uses gages such as go-no go, contour, snap, dial indicator, and wall reading. Maintains a record of quantity of ware rejected, and records reasons for failure of ware to pass inspection.

Wipes, wraps, and packs ware as instructed in accordance with standard procedures, using wiping cloths, wrapping, paper, and packing materials. Discards defective ware into specified cullet chute, bin, conveyor, or can.

Approved by *Date* *Approved by* *Date*

....

....

....

Plaintiff's Exhibit 36.

ANALYSIS OF JOB

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
1. *Manual Effort*				
Handle under 15# such as: inspecting light ware	—	50	32	60
2. *Visual Effort*				
Over 25% of shift: performing visual and dimensional inspections of glass products, continuously, for regular types of defects.	1	50	27	75
3. *Manual Accuracy*				
No appreciable difficulty to meet tolerances such as: the use of gages, dials, rings and plugs for inspection of various dimensions and visual defects.	1	50	20	125
4. *Manual Complexity*				
Gange and visually inspect ware for defects.	—	50	6	105
5. *Job Knowledge*				
Knowledge of ware defects, simple gauges and inspection techniques for a limited variety of ware, may obtain information for drawings.	—	50	57	115

Plaintiff's Exhibit 36.

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
6. *Responsibility for Problem Solving*				
Problem such as when defects in product exceed number and degree specified for item being inspected.	—	50	57	155
7. *Responsibility for Materials and/or Product*				
Ordinary care to prevent loss such as: 100 pieces of acceptable hand shop items/shift, rejected due to improper comparison of defects to limit samples or improper use of no-go gages.	1	50	57	120
Special Loss Allowance				
8. *Responsibility for Equipment and/or Tools*				
Ordinary care to prevent loss from: damage to such equipment as gages due to improper use.	2	50	72	105
Special Investment Allowance				
9. *Responsibility for Direction of others*				
None				0
10. *Surroundings*				
Normal factory conditions.	—	50	14	30
11. *Hazards*				
Frequent exposure to minor injuries such as: cuts from broken ware and burns from hot ware.	—	50	6	40
Total Points				930

Plaintiff's Exhibit 36.

HOURLY JOB ANALYSIS DATA SHEET

Q-38 (rev.)
Location: "A" Factory
Analyst: R. L. Lewis
Date: 3-10-64
Job Title: Inspector, Class C
Job Code No.: 80-1353

Analyze the job—NOT the employee

• • •

JOB CONDITIONS

Surroundings:

List elements regularly encountered: Intensity: Frequency: Normal factory conditions.

Hazards:

List hazards regularly encountered: Cuts, burns.
Severity of Injury: Minor.
Frequency: Frequent.

PLAINTIFF'S EXHIBIT 37.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY JOB EVALUATION

R-25 Job No.: 80
Location: "A" Factory Finishing Department Typed: 3/
Job Title: Inspector-Class B Effective:
Analyst: E. A. Welch Rev. 8/27/
Rev. 11/9

DESCRIPTION

Inspects a variety of shapes of ware made both au
tically and by hand for all types of glass quality,
finishing and dimensional defects, referring to glass
ings, written specifications, ware samples and verb
structions. Accepts or rejects ware. Checks dimen
conformance using go-no-go, gages, dial gages, c
gages, plug gages, ring gages, etc.

Inserts inspection tickets in cartons, glues labels in
operates ware counters, and sleeves ware as necessar

Washes, wipes, wraps and packs ware, in conjunctio
inspection as directed.
Seals cartons with tape, glue or staples as directed.

Records inspection results on proper report forms
forms foreman of defects found and any unusual t
the quality level.

Plaintiff's Exhibit 37.

Loads and unloads, in conjunction with inspection, finishing equipment such as diamond saw, drill press and automatic labeler.

Inspects ware such as: X-ray bulbs, refractors, pipe flanges, chemex ware, flares, stoppers, baking ware, etc.

Approved by	*Date*	*Approved by*	*Date*
.....	....	.....	.....
.....	....	.....	.....
.....	....	.....	.....

ANALYSIS OF JOB

	Bench Mark Jobs Less Than This Job	Same As This Job	More Than This Job	Points
1. *Manual Effort*				
Picks up, manipulates and packs ware weighing up to 15# continuously.	20	57	31	60
2. *Visual Effort*				
Close visual inspection of ware continuously.	29	57	67	75
3. *Manual Accuracy*				
Must use gages accurately for checking dimensional conformances.	60	57	65	135
4. *Manual Complexity*				
Manipulate ware and gage to correctly gage the ware such as: Reading wall thickness on optical gage.	15	57	39	105

Plaintiff's Exhibit 37.

	Bench Mark Jobs Less Than This Job	Same As This Job	More Than This Job	Points
5. *Job Knowledge*				
Thorough knowledge of all types of defects and their relationships to specifications.	23	57	19	120
6. *Responsibility for problem solving*				
Makes decisions as to accept or reject ware	19	57	28	170
7. *Responsibility for materials and/or product*				
Considerable care to avoid throwing away good ware or packing bad ware, such as: ½ to 1 hour of baking ware. (500—1000 pcs.)	54	57	48	135
Special Loss Allowance				
8. *Responsibility for equipment and/or tools*				
Ordinary care to avoid damaging gages.	23	57	40	105
Special Investment Allowance				
9. *Responsibility for direction of others*				
None				0
10. *Surroundings*				
Normal Factory conditions.	59	57	16	30
11. *Hazards*				
Frequent exposure to minor cuts and burns.	59	57	31	40
			Total Points	975

Plaintiff's Exhibit 37.

HOURLY JOB ANALYSIS DATA SHEET

Q-38 (rev.)
Location: A factory finishing department
Analyst: E. A. Welch
Date: 12-13-63
Job title: Inspector-Class B
Job Code No.: 80-4658

Analyze the job—NOT the employee

• • •

JOB CONDITIONS

Surroundings:

List elements regularly encountered: Intensity:
Frequency: Normal factory conditions.

Hazards:

List hazards regularly encountered: Burns Cuts
Severity of Injury: Minor
Frequency: Frequent

PLAINTIFF'S EXHIBIT 38.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY JOB EVALUATION

R-25-x — Job No.: 12-1354
Location: B & C Factory—Finishing & Inspection — Typed: 3/12/64
Job Title: Inspector Class C — Effective:
Analyst: R. S. Callaway

DESCRIPTION:

Inspects a limited variety of ware such as, standard types of bulbs and cylinders for specified glass quality, shop, finishing, and dimensional defects, using a limited variety of gages and working according to standard procedures. This work includes duties such as:

Inspects ware visually for such defects as stones, seeds, chill wrinkles, shear marks, blisters, and for improper grinding, sandblasting, beading, lipping etc. Use gages such as go-no-go, contour, snap, dial indicator; and wall reading.

Maintains a record of quantity of ware rejected, and records readings for failure of ware to pass inspection. Wipes, wraps, and packs ware as instructed in accordance with standard procedures using wiping cloths, wrapping, paper, and packing materials. Discards defective ware into specified cullet chute, bin, conveyor, or can.

Plaintiff's Exhibit 38.

Approved by	*Date*	*Approved by*	*Date*
.....	....	.....	.....
.....	....	.....	.....
.....	....	.....	.....

ANALYSIS OF JOB

	Bench Mark Jobs Less Than This Job	Same As This Job	More Than This Job	Points
1. *Manual Effort* Handles under 15# such as: inspecting light ware.	—	50	48	60
2. *Visual Effort* Over 25% of shift: performing visual and dimensional inspections of glass products, continuously for regular types of defects.	1	50	22	75
3. *Manual Accuracy* No appreciable difficulty to meet tolerances such as: the use of gages, dials, rings, and plugs for inspection of various dimensions and visual defects.	—	50	57	125
4. *Manual Complexity* Gage and visually inspect ware for defects.	—	50	20	105
5. *Job Knowledge* Knowledge of ware defects, simple gages, and inspection techniques for a limited variety of ware, may obtain information from drawings.	—	50	57	115

Plaintiff's Exhibit 38.

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
6. *Responsibility for Problem Solving*				
Problems such as when defects in product exceed number and degree specified for item being inspected.	—	50	57	155
7. *Responsibility for Materials and/or Product*				
Ordinary care to prevent loss such as: 100 pieces of acceptable hand shop items/shift, rejected due to improper comparison of defects to limit samples or improper use of go no-go gages.	1	50	57	120
Special Loss Allowance				
8. *Responsibility for Equipment and/or Tools*				
Ordinary care to prevent loss from: damage to such equipment as gages due to improper use.	2	50	57	105
Special Investment Allowance				
9. *Responsibility for Direction Of Others*				
None.				0
10. *Surroundings*				
Normal factory conditions.	—	50	11	30
11. *Hazards*				
Frequent exposure to minor injuries such as: cuts from broken ware and burns from hot ware.	—	50	6	40
Total Points				930

Plaintiff's Exhibit 38.

HOURLY JOB ANALYSIS DATA SHEET

G-38 (rev.)
Location: B & C Factory—Fin. & Inap.
Analyst: R. S. Callaway
Date: 3/12/64
Job Title: Inspector Class C
Job Code No: 81-1353

Analyze the job—NOT the employee

• • •

JOB CONDITIONS

Surroundings:

List elements regularly encountered: Intensity: Frequency: Normal factory conditions.

Hazards:

List hazards regularly encountered: cuts, burns
Severity of injury: minor
Frequency: frequent

PLAINTIFF'S EXHIBIT 39.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY JOB EVALUATION

R-25 Job No.: 4650
Location B & C Factory Typed: 10/15/63
Inspection & Finishing
Job Title: Inspector Class B Effective:
Analyst: N. M. Wisner

Inspects at various locations such as the discharge end of a lehr, conveyor, or on a table, a wide variety of items in clear and colored glasses (bulbs, cylinders, lens, fresnels, filters, tubing, dental reflectors, radomes, range top ware, and experimental ware) for glass and shop faults using, ware samples, drawings, product specifications, microscope, pocket comparitor, templates, according to an established procedure. Paek the ware following packing specifications. This work includes duties such as:

Inspects & gauges all hand and automatic made ware of all colors for glass, shop and finishing faults such as (stones, blisters, cord, wall, streak, slack blown, length cutoff, firepolish) using product specifications, ware samples, drawings, gauges, templates.

Measure ware strain on polarscope and color transmission on photometer to determine in specification ware. Wipes, wraps, and packs ware using packing specification.

Records select and faults on inspection form.

Plaintiff's Exhibit 39.

Approved by	*Date*	*Approved by*	*Date*
.....	....	.....	....
.....	....	.....	....
.....	....	.....	....

ANALYSIS OF JOB

	Bench Mark Jobs			
	Less Than This	Same As Job	More Than	Points
1. *Manual Effort*				
Handles under 15# over 50% of the shift	53	57	51	60
2. *Visual Effort*				
Over 50% of shift continuously inspects all colored and/or clear glasses for shop faults and glass faults such as stones, seeds, blisters, cord, color, etc.	23	57	22	75
3. *Manual Accuracy*				
Use of gage to measure a variety of ware visually and dimensionally to .001".	50	57	20	135
4. *Manual Complexity*				
Inspects ware for all defects. Measures wall by manipulating ware in many different types of dial indicator gauges. Packs ware.	53	57	59	105
5. *Job Knowledge*				
Knowledge of specifications, gauges, inspection, and packing techniques, stress reading, color transmission, correct inspection lights.	50	57	20	120

Plaintiff's Exhibit 39.

	Bench Mark Jobs Less Than This Job	Same As This Job	More Than This Job	Points
6. *Responsibility for Problem Solving*				
Problem such as correct interpretation of product drawings and specifications on a wide variety of colored and clear glasses to reject or accept the ware based on defect found.	50	57	24	170
7. *Responsibility for Materials and/or Product*				
Constant care to prevent loss of up to 4 hours of production due to rejecting acceptable ware.	50	57	27	135
Special Loss Allowance				
8. *Responsibility for Equipment and/or Tools*				
Ordinary care to prevent loss from damage to such equipment as gauges through improper use.	52	57	31	105
Special Investment Allowance				
9. *Responsibility for Direction of Others*				
None.				0
10. *Surroundings*				
Normal factory conditions.	50	57	23	30
11. *Hazards*				
Occasional exposure to injuries such as cuts from broken glass and burns from hotware.	50	57	23	40
			Total Points	975

Plaintiff's Exhibit 39.

HOURLY JOB ANALYSIS DATA SHEET

Q-38 (rev.)
Location: B & C Factory
Analyst: N. M. Wisner
Date: 10/15/63
Job Title: Inspector Class B
Job Code No.: 81-4685

Analyze the job—NOT the employee

• • •

JOB CONDITIONS

Surroundings:

List elements regularly encountered: Hot, noisy, cold
Intensity: normal.
Frequency: continuous

Hazards:

List hazards regularly encountered: breaking ware, hot ware, acid.
Severity of Injury: cuts, burns, acid burns
Frequency: occasionally.

PLAINTIFF'S EXHIBIT 40.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

HOURLY JOB DESCRIPTION

R-25-p Rev. 1/65	Job No.: 95-4672
Location: Pressware-several Departments	Typed: 12/14/63
Job Title: General Television Inspector	Effective:
Analyst: R. M. Searles	Revs. 11/6/65

DESCRIPTION:

Inspects Black and White and Color Television funnels, panels, necks and bulbs for all types of glass quality, shop, finishing and dimensional defects, comparing with tolerances established by verbal and written specifications, drawings, sketches and limit samples. This work includes such duties as:

Inspects ware visually for all defects such as stones, seeds, blister, chill, shear mark, cord, spew, checks (various), oil marks, and general face and surface quality and for all finishing defects such as cold seal, checked button seal, checked pin seal, defects of polish face quality, "velvetone" surface, edge grind and acid fortify etc.

Inspects ware for dimensional conformance to specifications using such equipment as electricator gauge, Moore Air Gage, flat pate, feeler gauge, go-no-go plug gauge, height contour gauge, calipers, electronic gauges etc.

Wipes and packs ware using cloths, paper and packing cartons and maintains records of pieces rejected by types and reasons for rejections.

Plaintiff's Exhibit 40.

Instruct lesser skilled inspector
Maintains good housekeeping conditions in working area.
Observes safety regulations and practices.

The above statement reflects the general details considered necessary to describe the principle functions of the job identified and shall not be construed as a detailed description of all of the work requirements that may be inherent in the job.

Approved By	*Date*	*Approved By*	*Date*
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

HOURLY JOB EVALUATION
R-25-E

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
1. *Manual Effort* Pickup, inspect, gauge various television parts, dispose of lehr rack etc. over 50% of shift.	49	54	6	85
2. *Visual Effort* Up to 25% of shift inspecting TV parts closely, reading gauges and visually checking defects. Newsprint level over 25%. Minute detail 5%-10% hold blister to .25 ± .005" using plastic gauges showing inspection sizes and comparator gauge where necessary.	51	50	27	75

Plaintiff's Exhibit 40.

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
3. *Manual Accuracy* Visual and mechanical measurement to .025′ ± .005″ for blisters etc. Keep polish quality within accepted limits. Pick up and set down approx. 20 lbs. of TV panel and gauge without bruising etc. Reaction time-normal.	50	20	67	135
4. *Manual Complexity* Uses variety of calipers and optical gauges to obtain dimensional readings and visual comparisions of defects with respect to limit samples and specifications.	21	53	48	105
5. *Job Knowledge* Knowledge of understanding of specifications and uses of gauges for all TV parts and bulbs. Knowledge of various types of defects and ability to determine whether in or out of specifications. Addition and subtraction and multiplication.		40	48	115
6. *Responsibility for Problem Solving* Correct interpretation of specifications. How to handle "border line" cases whether in or out of specifications.		50	51	155

Plaintiff's Exhibit 40.

	Bench Mark Jobs Less Than This	Same As Job	More Than	Points
7. *Responsibility for Materials and/or Product*				
Improper interpretation or applications or specifications can result in loss of truck load of ware (1600 panels) being rejected at customers. This means return reinspection etc.	50	53	46	135
Special Loss Allowance				
8. *Responsibility for Equipment and/or Tools*				
Careless handling of ware on Moore Air Gauge could knock it out of adjustment very easily. Gauge is checked against master once each hour. The ware loss could be ½ hours production.	15	53	17	105
Special Investment Allowance				
9. *Responsibility for Direction of Others*				
None				0
10. *Surroundings*				
Normal factory conditions	2	53	6	30
11. *Hazards*				
Possibility of minor (sometimes major) cuts occasionally.	50	53	6	40
Total Points				980

Plaintiff's Exhibit 40.

HOURLY JOB ANALYSIS DATA SHEET
Q-38(rev.)
Location: Pressware.
Analyst: R. M. Searless.
Date: 2/28/64.
Job Title: General Television Inspector.
Job Code No.: 92-4672.

Analyze the job—NOT the employee

• • •

JOB CONDITIONS

Surroundings:

List elements regularly encountered: Heat.
Intensity: Normal.
Frequency: Continuous.

Hazards:

List hazards regularly encountered: Broken glass.
Severity of Injury: Cuts-minor to severe.
Frequency: Occasionally.

• • •

PLAINTIFF'S EXHIBIT 42.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

A MANUAL
FOR
OCCUPATION EVALUATION

•

Prepared by
B. C. GOULD
CHICAGO DIVISION

•

STEVENSON, JORDAN & HARRISON, INC.
MANAGEMENT ENGINEERS
19 WEST 44TH STREET, NEW YORK
779 Washington Street, Buffalo, New York
205 West Wacker Drive, Chicago, Illinois
Hanna Building, Cleveland, Ohio

English Subsidiary
STEVENSON, JORDON & HARRISON, LTD.
324 Australia House, Strand, London, W. C. 2

Canadian Affiliate
STEVENSON & KELLOGG, LTD.
970 Sun Life Building, Montreal

• • •

Plaintiff's Exhibit 42.

GENERAL

TO ESTABLISH wage rates with proper differentials between occupations, it is first necessary to analyze the requirements of the work and the duties involved in each occupation, regardless of the qualifications of the personnel that may perform the work. When these requirements are known, a sound method of evaluation will determine their relative value and thus a basis for establishing equitable hourly wage rates.

The plan set forth in this manual is based on an analysis of seven prime elements of industrial occupations: General Schooling, Training Period, Manual Skill, Versatility, Job Knowledge, Responsibility, and Working Conditions. It should be stated here that factors such as productive ability, ingenuity and effort have been considered as personal attributes, and should be reflected in a measurement of individual performance to be rewarded, together with seniority, in accordance with each company's specific policy on such subjects.

The principle of evaluation used in this plan is unique in that all differentials are made from one common base—the prevailing unskilled labor rate of the vicinity and/or industry—thus providing a sound basis of establishing equitable occupation rates, and also a method of maintaining that equality as the entire structure of rates moves up or down with changing conditions in any vicinity.

Perhaps the most important factor to be considered in establishing wage rate differentials is the judgment required to analyze the various elements of the occupations. The procedure as described, together with the forms illustrated in this manual, provides a means of reducing the

possible error of personal judgment to a minimum, and also furnishes a permanent record of considerable value when a general change in wage rates becomes advisable.

When the common base has been established, and the problem of seniority, rate of output, etc., isolated as separate problems, all individuals who are familiar with its operation will arrive at the same value by the use of this plan.

Working Conditions

This element refers to the surrounding conditions and physical hazards to which employees are unavoidably subjected while performing the duties of an occupation.

Due to the fact that degree or extent of working conditions will vary greatly in different industries and plants within the same industry, it is not possible to predetermine a fixed value for each condition. However, working conditions have been classified into three groups, together with a description of various degrees in each with assigned values, to serve as a basis for evaluating local conditions at any plant.

The three classes of working conditions are: *Surrounding Conditions, Minor Hazards, and Major Hazards.* When rating an occupation on this element it is necessary to analyze the conditions and the extent to which they exist, and determine the value for each class accordingly. Should conditions exist which are not specified or should they exist to a degree not described, the values may be increased up to 100 in any one group.

• • •

Plaintiff's Exhibit 42.

PROCEDURE

IT IS important to emphasize the fact that it is impossible to evaluate occupations properly until the various requisites have been accurately analyzed. Therefore, it is necessary that this analysis be prepared by persons who are thoroughly familiar with the operations and work of each occupation. A group consisting of the department foreman, personnel director, general foreman, and the "standards and methods" representative, has been found to be most logical and effective. Employees themselves may participate in the evaluation of their own occupations, if such a group is not too large.

DETAIL

1. The work sheet headed "Summary Sheet" provides a means of recording the requisite values determined for each occupation. The first step of the procedure, therefore, is to enter at the top of this sheet the identification of department, persons making analysis, and date, together with the unskilled labor rate of the vicinity. All of the occupations in the department to be evaluated should be identified and listed under the column headed "Occupation Description."

2. The next step is the preparation of the "Analysis Record" for each occupation. This form is designed to provide a record of the requirements of each occupation to obtain accurate analysis and evaluation of each element. The preparation of this record includes a summary of the duties involved and the degree or extent of each element necessary for satisfactory completion of the work

Plaintiff's Exhibit 42.

3. The next step is the grading of occupations in accordance with the requirement of each prime element. The values and descriptions for various degrees of each element are listed on the following pages. With the specifications of each occupation on the Analysis Record as reference, the selection of the proper value of each element is facilitated, especially when the gradings for a number of occupations are completed on each element separately. When the values for each occupation have been selected they are entered on the "Summary Sheet" and totaled.

4. The next step is converting the total values selected to a rating factor. This is done by reference to the "Conversion Chart" which consists of two scales and a curve. The horizontal arithemetic scale represents the total index value and the vertical logarithmic scale represents the rating factors. To determine the rating factor it is only necessary to locate the index total figure on the horizontal scale, its point of intersection with the curve, and to read the rating factor at the opposite point on the vertical scale.

5. The rating factor for each occupation is entered on the "Summary Sheet" and reflects the differentials between occupations. The basic wage rate is determined by the rating factor as a percentage increase over the unskilled labor rate of the vicinity.

6. *Example of Calculation*

Total Index Figure 600
Rating Factor 1.67
Common Labor Rate (Male) .....$0.50 per hr.
1.67 X .50 = .8357 Occupation Wage Rate .....$0.84 per hr.

• • •

Plaintiff's Exhibit 42.

Occupation Evaluation

WORKING CONDITIONS

Value	*Degree*	*Description*
		Surrounding Conditions
		(Wet, Heat, Cold, Dust, Grease, Noise, Etc.)
10	Normal	For occupations on which the working conditions are normal, with the above typical disagreeable features existing only non-continuously or to a slight degree.
20	Poor	For occupations on which the working conditions are poor, with one or two of the above typical disagreeable features existing to a marked degree or several of them prevalent continuously.
40	Very Poor	For occupations on which the working conditions are poor, with several of the above typical disagreeable features existing continuously to a marked degree.
		Minor Hazards
		(Bruises, Cuts, Heavy Lifting, Fumes, Slippery Floors, Etc.)
15	Normal	For occupations on which one or two of the above typical minor hazards are frequently encountered in only a slight degree.

Plaintiff's Exhibit 42.

30	Considerable	For occupations on which several of the above typical minor hazards are frequently encountered in only a slight degree or one of them constantly encountered to a marked degree
60	Very High	For occupations on which several of the above typical minor hazards are constantly present or frequently encountered to a marked degree.

Major Hazards

(Machine, Chemicals, Gases, Body Injuries, Etc.)

25	Normal	For occupations on which one of the above typical major hazards is constantly present, with, however, the protection of normal safety measures.
50	Considerable	For occupations on which several of the above typical hazards exist continuously to a marked degree, with, however, the protection of normal safety measures.
100	Very High	For occupations on which several of the above typical hazards exist continuously to a marked degree, and on which the safety measures available cannot provide adequate protection.

• • •

Plaintiff's Exhibit 42.

OCCUPATION EVALUATION

SUMMARY SHEET

Dept. *Name* Labor Rate *Amount* Date *of evaluation*

Analysis by *Names of individuals preparing the evaluation*

No.	OCCUPATION DESCRIPTION	GEN'L SCHOOLING	TRAINING PERIOD	MANUAL SKILL	VERSATILITY	JOB KNOWLEDGE	RESPONSIBILITY	WORKING CONDITIONS	TOTAL INDEX	RATING FACTOR	BASE RATE-MILS	BASE RATE-PENNIES

Identify here each occupation to be evaluated

Enter here the values selected on each element for each occupation

Total values for each occupation.

Determine from conversion chart.

Calculated from rating factor and labor rate

PLAINTIFF'S EXHIBIT 47.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Katherine Kessler—Clock No. 2833
346 Oak Street
Corning, N. Y.

Service No.-5-8-28
Retired—June 1, 1947

LINE No.	*Date*	*Rate*	
1	9- 8-24	20¢	Employed as Helper by A. G. Wilcox
2	10-13-24	22¢	
3	11-17-24	24¢	
4	1-19-25	24¢	Finishing
5	3-12-25	24¢	Inspection
6	10-10-25	24¢	Quit to do housework
7	6-10-29	20¢	Re-employed as Helper by A. G. Wilcox
8	7- 1-29	22¢	
9	8-26-29	24¢	
10	10- 7-29	26¢	
11	10-28-29	28¢	
12	8- 4-30	28¢	Laid-off
13	10- 6-30	28¢	Re-employed as Helper by A. G. Wilcox
14	9- 6-32	25¢	General Decrease
15	7-31-33	30¢	" Increase
16	4-16-34	33¢	" "
17	3-28-37	40¢	" "
18	3- 2-41	42¢	Pyrex Inspection
19	3- 9-41	47¢	General Increase
20	9-28-41	52¢	Rate change
21	10-19-41	54¢	Inspector-Pyrex Finishing
22	1-11-43		Last date worked—Sick Leave —T & P—1947

PLAINTIFF'S EXHIBIT 48.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Helen M. Callanan—121 W. Fifth St.—Corning, N. Y.
Employed by CGW—11-15-15 to retirement 2-17-36

LINE No.	*Date*	*Rate*	
1	11-15-15	13¢	Employed as Inspector
2	5- 3-16	14½¢	
3	9-12-17	16¢	
4	3-27-18	18¢	
5	7- 3-18	20¢	Gen'l Increase
6	10- 9-18	23¢	" "
7	10- 6-19	25¢	
8	3-29-26	26¢	
9			Lv. of Absence to visit sister—7-2-27
10	9- 6-27	26¢	Re-employed by S. F. Cany as Helper
11	10-18-27		Last date worked—Illness
12			
13	4-25-28	26¢	Re-employed following illness
14	12- 9-29	28¢	
15	9- 6-32	27¢	Gen'l decrease
16	7-31-33	31¢	Gen'l Increase
17	4-16-34	34¢	" "
18			
19	2-13-36		Last date employed—Granted a pension at $3.00—week—effective 2-17-36
			Death—4-10-44

PLAINTIFF'S EXHIBIT 49.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Hattie Strong #880

Reemployed	11/15/20	as Inspector	@ 24¢ + / insp. piece rate ? per H.S.
"	11/21/21	"	22¢
?	7/12/22	?	28¢
Back to work	8/ 8/23	?	22¢
	6/29/24	?	30¢
Reemployed	9/18/29	as Insp.	30¢
	10/14/29		32¢
	Home		
Reemployed	6- 9-30	Helper	24¢
	Home		
Reemployed	12- 9-30	Insp.	24¢
"	3-16-31	Insp.	24¢
	Home		
Reemployed	5-11-31	Insp.	24¢
No decrease	9- 6-32	Insp.	24¢
GI	7-31-33		30¢
GI	12-25-33		32¢
GI	4-16-34		35¢
	1-18-37	Inspector	37¢
GI	3-28-37		44¢
GI	3- 9-41		49¢

PLAINTIFF'S EXHIBIT 52.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Carl D. Barney—
RD #4—Corning, N. Y.

Emp. No. 04480
Service Date—9-17-20
Retired 10-64

LINE No.	*Date*	*Rate*	
1	3- 2-26	36¢	Reemployed by A. G. Wilcox—As helper*
2	5-23-27	39¢	
3	8-29-27	42¢	
4	6-18-28	45¢	
5	4- 1-29	48¢	
6	6-17-29	53¢	Inspector
7	9- 6-32	48¢	General decrease
8	7-31-33	53¢	" Increase
9	4-15-34	58¢	" "
10	12- 2-35	61¢	Special Inspector
11	11-30-36	66¢	Inspector—Dept. 12
12	3-28-37	71¢	General Increase
13	3- 9-41	76¢	" "
14	9- 2-41	90¢	Work as Gaffer
15			
16			
17			

* Prior periods of employment in 1920-1921-1923-1924-1925 were as gatherer—hand bulbs. The intervening periods were lay-offs due to no work; other employment etc.

PLAINTIFF'S EXHIBIT 53.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

James H. Thompson
RD#1 Snvona N. Y.

Service No.—5-24-20
Retired 10-1-64

LINE No.	*Date*	*Rate*	
1	10-27-19	.275	Employed as Helper by L. West
2	3- 1-20	.30	
3	3- 1-20	.33	
4	4-15-20		Quit
5	5-24-20	.365+	Reemployed by W. Foshay
6	7-26-20	.41	
7	11- 1-20	.43	
8	3-21-21		Laid Off (was Inspector in Finishing)
9	4- 3-21	.40	General Change of Rate
10	1-30-22	.36	Reemployed as Helper by H. Harris
11	10- 2-22	.38	
12	1- 1-23	.40	
13	5-21-23	.42	
14	10-13-24	.45	
15	1- 4-26	.48	
16	12- 3-28		Tranferred to A. Wilcox
17	1-13-30	.53	Inspector #6
18	1- 1-32	.53	Transferred to M. Lewis #2 Inspector
19	2- 6-32	.48	General Decrease
20	7- 1-33	.53	General Increase
21	4-15-34	.58	" "
22	12- 7-36	.60	Inspector #12
23	3-28-37	.65	Pyrex Finishing #2
24	3- 9-41	.70	
25	3-28-41	.75	
26	11-30-41	.80	Cutter, Inspector, Lantion Filer

PLAINTIFF'S EXHIBIT 58.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEPOSITION OF SETH J. McKIBBIN.

[November 7, 1968.]

Appearances:

Isabelle R. Cappello, Esq., Deputy Counsel for Regional Litigation, Office of the Solicitor, Washington, D. C., appearing for the Plaintiff.

Francis V. La Ruffa, Esq., Chief Trial Attorney, 341 9th Ave., New York, New York, for the Plaintiff.

Scott F. Zimmerman, Esq., Reed, Smith, Shaw & McClay, 747 Union Trust Bldg., Pittsburgh, Pa., appearing for the Corning Glass Works.

• • •

---

[7] Whereupon, SETH J. McKIBBIN, was called as a witness, and testified as follows:

Direct Examination by Mrs. Cappello:

• • •

[8] Q. What is your present title? A. Manager of Statistics and Surveys.

Q. And in connection with these duties, do you have general powers to exercise judgment and discretion in dealing with them? A. Yes.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. Mr. McKibbin, did you answer Plaintiff's first and second set of interrogatories on behalf of Corning Glass Works? A. I did.

Q. Mr. McKibbin, I would first like to question you about rates back in 1930. You are familiar with answers eight and nine the interrogatories? Would you like to look them over? A. Yes, please.

(Document handed to witness.)

Yes, I am familiar with these.

Q. And you are claiming, for purposes of this suit, that the time of day work is a working condition? A. Yes.

Q. Is Mr. E. W. Noble considered by Corning Glass to be an expert in Corning Glass's Job evaluation plans? [9] A. He is, in my opinion.

* * *

[13] A. To the best of my knowledge, there were no schedules as such.

Q. Were there male and female rates in 1930? A. There were rates being paid to men and women in 1930, yes.

Q. And they were on a different scale? A. Well, since there was no scale, I cannot testify that they were on a different scale.

Q. Were men and women on separate seniority lists in 1930? A. I am not equipped to answer this. It is my best understanding that there were no such things as seniority lists in 1930?

Q. Well, were women paid at lower rates than men in 1930 for inspection work? A. The record demonstrates this.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. In answer nine to the first set of interrogatories, you said that men on the night shift were diverted from other jobs to go onto inspection work. What were these other jobs? [14] A. Most of them were in the blowing room, a variety of jobs from helper to gatherer, according to the record that we have established.

Q. Gatherer? A. Yes.

Q. Would you please describe the duties of these jobs? A. Well, in general, it is my understanding that the helper in the blowing room was what we now call a shop boy, and in essence he was a low skilled part of the crew that formed glass by hand. The gatherer was a higher level job in the same team and his job was to gather the glass from the molten tank and begin the forming operation.

• • •

[17] Q. You state in answer nine that the inspection worker enjoyed less prestige than other activities on the night shift. Was it dirtier work? A. No, I think it was considered to be female work.

Q. The men wouldn't work at the female rate? A. I am not prepared to say that they wouldn't, they disliked it.

Q. What were the hours of steady night shift, day shift and afternoon shift in 1930, approximately? A. I am not sure what the day and afternoon shift was, specifically, it is my understanding that the night shift started at either ten, eleven, or twelve at night.

• • •

[18] Q. And what rate were the men assigned when they were put on inspection work in 1930? A. Fifty-three cents.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. And so they got an increase for going on inspection work? A. They received an increase in their base rate for going on inspection work.

Q. Why was that, Mr. McKibbin, do you know? A. It is my understanding that these men worked in the blowing room on an incentive operation, and while their rate of pay was, I believe, forty-eight cents, that their earned rate, if you will, was considerably above that, and that the increase in their base rate was necessary to encourage them to take this demeaning work.

Q. Demeaning because it was women? A. In their judgment, it was demeaning.

Q. Did there come a time when newly hired men were put on inspection work? A. I am sure it came along eventually. I am not sure when.

Q. And when the newly hired men came, were they [19] given the women's rate or the men's rate? A. I would assume that they were paid corresponding to the—to their training and experience, being paid to the men already performing the job.

* * *

Q. What kind of lifting and carrying did the men inspectors do in 1930? A. It is my understanding that the men inspectors on the night shift did their own utility work.

[32] Q. How long did Corning Glass Works have separate male and female hiring rates? A. For as long as I have been able to—Well, let me restate it, as long as I know.

Q. Would they have had them in 1946? [33] A. Yes.

Q. And in 1930? A. Yes.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. What was the minimum hiring rates for men and women on June 9, 1964, would they be the rates you have just stated? A. No, they would not.

Q. What would they be? A. According to Exhibit K-10 and K-11—

Mrs. Cappello: Off the record a minute.

(Discussion off the record.)

Mr. McKibbin: According to sheets 10 and 11 of Exhibit A, the male starting rate was $1.99, and—these should be pages 9 and 10 of Exhibit A, the male starting rate was $1.99, and the female starting rate was $1.89.

Mr. Zimmerman: What was the date?

Mr. McKibbin: Dated November 19, 1962.

By Mrs. Cappello:

Q. And I ask if these were the rates on June 9, 1964, and these were the rates? A. That's right.

Q. What were they on June 11, 1964? A. We no longer had minimum starting rates on a sex basis, it was dependent upon the job classification the employee was hired into.

• • •

[36] Q. Is the revised hourly rate schedule furnished in answer three to the first set of interrogatories the same as the eleven sheet of Exhibit A? A. Yes.

Q. And this revised hourly rate schedule went into effect on June 11, 1964? A. It did.

Q. Mr. McKibbin, I want you to explain for us how the rates for men and women inspectors were effected by the change from separate male and female rate schedules that

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

had been [37] used up to June 11, 1964 to the one revised rate schedule, and I would like you to use in this connection Exhibit A, B and C to your supplemental answers to our second set of interrogatories, and the eleventh sheet of Exhibit A to this deposition.

• • •

Q. Mr. McKibbin, I am going to hand you Exhibit A to your supplemental answer 22, Exhibit C to supplemental answer 23 and Exhibit B to supplemental answer 22.

Using these Exhibits, plus sheet eleven of Exhibit A to your deposition, please explain how the rates for men and women inspectors in class C, class B, T. V. and general T. V. inspection work were effected by the change from separate male and female rate schedules that had been used up until [38] June 11 to the one revised hourly rate schedule? A. Let me just get organized here, because I'm not sure what you want.

• • •

Mr. McKibbin: Looking at the female schedule dated November 19, 1962 I believe the class C female inspectors were a group 3, with job evaluation .215 to .235 with a rate range running from $1.89 to $1.97½.

On the schedule that became effective June 11, 1964, they were classified as "new group" 1, and their rate of pay was $1.97½. Any female employee who was—whose rate of pay on June 10, 1964 was $1.89, $1.93½ or $1.95½ received an immediate adjustment effective June 11, 1964 to the rate of $1.97½.

• • •

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Female class B inspectors, I believe were group 6, under the rate schedule effective November 19, 1962, and the rate of pay ran from $1.89 through $2.05½. On June 11, pursuant to the schedule that was made effective that date, any employee, any class B inspector employee, female, who was receiving less than $1.97½ received an immediate increase to [39] $1.97½, and employees who were rated at $1.99½ were increased to $2.01½, and those who were rated $2.05½ remained the same.

By Mrs. Cappello: When you say, "Class B", you also referred to general T. V.?

A. Anything that I have said about the class B inspectors would be equally applicable to the general T. V.—

Q. And anything that you have said about class C would be applicable to T. V. inspector? A. Yes, on the day shifts, as in regards to the men, on the night shift, June 10, 1964 a class C night inspector or a T. V. night inspector was in old group 2, and the rates ran from—their job evaluation points ran from 165 points to 235 points and their individual hourly rates of pay ran from $1.99 to $2.13½.

On June 11 their rates would have been adjusted, any night class C inspector with a rate of $1.99 would have been increased to $2.01½. An employee at $2.03½ would have been increased to $2.05½. An employee at $2.08½ would have been increased to $2.09½, and those at $2.13½ had no rate change.

The class B night inspectors—

Q. And general T. V.? A. And general T. V., night inspectors were in old group 4, which is a point value run-

ning from 300 to 350 points, and their rates ran from $1.99 to $2.23½. Similarly any [40] employee on one of those classifications who was rated at $1.99 would have been increased to $2.01½. An employee at $2.03½ would have been increased to $2.05½. One at $2.08½ would have been increased to $2.09½, and those at $2.13½—$2.18½ and $2.23½ would not have had a rate adjustment.

Q. Would you now explain the hourly group number conversion table, and for what purposes that was used? A. This table shows—this table shows that we converted old group numbers to new group numbers by combining old female group numbers 1, 2, and 3-A into new group number 1. Old female group numbers 4 and 5-A into new group 2. Old female group number 6-A into new group number 3. Old female group number 1 and female group number 7-A into group 4, and old male group number 2 and old female group number 8-A to new group number 5, and so forth.

Q. Does this conversion table indicate that no men went into group numbers 1, 2, and 3? A. On June 11 I believe that is so.

Q. What does the irregular schedule mean? A. The irregular schedule applies in certain class type activities, in which the lower end of the rate range of the higher job which overlapped the upper end of the lower level job was eliminated, and this may be the case in class-B and C inspectors. I am not sure.

Q. Why were decimal points and the letter "A" in the [41] female column but there were none in the male column? A. There could well have been decimals in the male column, and there would be—the "A" designation

under the female groupings under the old program was aware of disinguishing between the two schedules. It was an administrative thing, we frequently refer to them as A's or as female schedules.

Q. So all the men inspectors went into GP numbers 5 and 7 on the revised hourly rate schedule on June 11? A. All the male inspectors being on the night shift, that is true.

Q. And all of the women inspectors went into GP number 1 or 3 on the revised schedule on June 11, 1964? A. Yes.

Q. In answer 20 to our first set of interrogatories, you told us that the job evaluation points were the same on all shifts for class C, B, T. V. and general T. V. inspectors. Under both your SJ and H plan and your CGW plan, the latter plan rating effort and the SJH plan not rating effort— A. That is my recollection.

Q. Would you like to see that answer?

(Document handed to witness.)

A. Yes.

Q. This being so, Mr. McKibbin, why didn't the men and women go into the same wage group when you converted them to one rate schedule? [42] A. Well, I think this is what happened up in the history of thirty-some years worth of industrial experience and negotiating with the Union for some part of that time. I think that is the answer in summary. This is a whole wealth of background.

Q. When you went to the one revised hourly rate schedule, did you preserve the rates that were in the male and female schedules? A. If I understand your question, no. There were changes.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. Well, at the top of the—Why were there changes? A. Well, we eliminated all of the rates below $1.97½, as a for instance—

Q. Employees doing class C, class B, T. V. and general T. V. inspection work who were at the maximum range, were their rates changed when you went from the male and female schedule to the revised hourly rate schedule? A. I believe not.

Q. So their rates were preserved in the conversion process? A. At the maximum. Yes.

• • •

[50] Q. Has this differential between utility workers and inspectors been about the same since 1964? A. Approximately.

Q. Does the base hourly rate of a utility worker change depending on the shift he works? A. Not his base hourly rate.

Q. Does this result in a utility worker getting more then inspectors on the day and afternoon shift and less on the night shift? A. Would you restate that, please?

Q. Does this result in a utility worker on the day and afternoon shift assisting an inspector getting more than the inspector? A. Yes, on the day shift?

Q. When the same utility worker goes onto the night shift, he gets less than the inspector? A. In base hourly rates, is that your question?

Q. Yes. A. Yes.

Q. From your experience in the industrial relations [51] department, is there a sound economical reason for such a situation? A. Yes, ma'am.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. What is it? A. Well, this is inherent in the revolution of the rates of pay that Corning Glass Works currently pays, and as we discussed earlier when the night shift initially started we had to pay a premium and, I am using my term now, in order to induce people to take on this unsavory work and that rate has persisted down through the years with the union's knowledge and consent. It has been a negotiable item.

Q. And the men just wouldn't work at the women's rate? A. Yes.

• • •

[52] Is there a plant-wide night shift differential that is paid for steady night shift work? A. There is a steady night shift differential negotiated as part of the contract.

Q. What is the purpose of such a night shift differential? [53] A. Well, I am sure it is different things in the minds of different people, but it is a generalization, I say it was agreed upon the amount of compensation to be paid, in addition to the individuals hourly rate for the undesirable hours of work.

Q. And for the inconvenience? A. For all aspects of those undersirable hours.

Q. Have the men that do inspection work on the night shift also gotten any plant wide night shift differential that was negotiated— A. To the best of my knowledge and belief, yes.

Q. Do any other men on steady night shift receive a a higher base hourly rate than those doing the same job on other shifts? A. Would you restate that, please.

Q. Do any other men on steady night shift receive a higher base hourly rate than those that do the same work

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

on the other two shifts? A. To the best of my knowledge and belief there are no other people currently receiving a higher base rate on the day shift.

Q. Has there ever been? A. As—

Q. Would you explain that action, please. A. Well, years ago whenever we needed the historical [54] female activities performed on the night shift as inspection, the only way we could get it done was to get a man to do it, and historically our experience was that we had to pay a premium to get a man to do it.

Q. And I believe you said that utility workers get the same base hourly rate on all shifts. Is that correct? A. Yes.

Q. Do you have any inspectors who work steady on the second shift? A. I am not sure, currently. We presumably have had at some point in time.

Q. What are the hours of the second shift, are they— A. I am not sure what you mean by the "second shift".

Q. The afternoon shift. A. The afternoon shift normally starts at 2:00 o'clock p.m., 3:00 p.m., or 4:00 p.m.

Q. And last until what hour? A. For an eight hour period.

Q. Do you pay a plant-wide shift differential for the afternoon? A. We have a six cent shift differential for shifts starting at 2:00, 3:00 and 4:00 o'clock, as detailed in the contract.

Q. Aren't the second shift hours less desirable and convenient than the day shift hours? [55] A. I am not prepared to pass a judgment on that, except as it pertains to me.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

Q. You may answer that question as it pertains to you, then. A. I have worked shifts, and to me the most disagreeable hours possibly would be the night shifts, steady night shifts, in my personal opinion.

Q. My question was whether the afternoon shift hours, lasting until midnight, aren't less desirable and convenient than the day shift hours? A. I am sorry. Presumably, yes.

Q. Do second shift inspectors get the same base hourly rate as the—Do the afternoon shift inspectors get the same base hourly rate as the day shift inspectors? A. Yes.

Q. Why don't they get a higher base hourly rate like the third shift if it is to compensate for—let's see—less desirable and inconvenient working hours? A. I suppose the right way to answer that is that we have never negotiated such an understanding.

• • •

[57] Q. Well, you say that the factor other than sex accounts for the differential in base hourly rates between the men and the women is due to less desirable hours of work and inconvenience of working steady nights, but you don't apply that throughout the plant; is that correct?

Mr. Zimmerman: I don't know what you mean, you don't apply that—You don't apply what?

Mrs. Cappello: Well, with other third shift employees, who do the same work, they all get the same base hourly rate.

Mr. Zimmerman: First of all, are there—the question is based on the same assumption that you made in the last question, you say are there other employees who worked different hours and do the same work.

Mrs. Cappello: All right. I will rephrase that question.

By Mrs. Cappello:

Q. Are there employees working a third shift, performing the same work as employees on the day and afternoon shift? [58] A. On a steady night basis?

Q. Yes. A. I believe there are.

Q. Do they all get the same base hourly rate except for inspectors? A. I believe so.

Q. Now, I don't understand how you can say that that differential, as between the inspectors is due to less desirable hours of work, and inconvenience of steady nights, since you don't compensate other employees in that manner. A. Well, as I have tried—

Mr. Zimmerman: Is that a question or a statement?

By Mrs. Cappello:

Q. Do you agree with that, Mr. McKibbin? A. Well, I think you are losing the sight of the historical derivation of the rates that we pay inspectors.

Q. And that historical reason is that the men wouldn't work for what the women were getting; is that right? A. Yes.

Q. And isn't that a fact—

Mr. Zimmerman: Well, just a second now, isn't there more to it than that, Mr. McKibbin?

Mr. McKibbin: Among other things, that is true.

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

By Mrs. Cappello:

Q. What are these other things? [59] A. Well as we have discussed earlier, the loss of incentive income, the loss of opportunity to work overtime, the disagreeable hours and so forth.

• • •

[76] By Mrs. Cappello:

Q. Were the men inspectors assigned to do inspection work on the day and afternoon shift on a temporary basis? A. Would you restate that, please?

Q. Were the men inspectors assigned to do inspection work on the day and afternoon shifts on a temporary basis?

Mr. Zimmerman: At what point in time are you speaking?

Mrs. Cappello: After the men were able to get on to the day and afternoon shifts.

The Witness: Not to the best of my knowledge.

By Mrs. Cappello:

Q. Those were permanent assignments? A. As permanent as any of our transactions are.

Q. What period of time does exhibit I cover?

• • •

[77] Q. What period of time does exhibit I cover? A. From June 1, 1966, to June 2, 1968.

• • •

[87] Q. You refer, in several of your answers, to past practices under your contracts. In 1944, before the past practice clause was first enacted, what were the rates of the men and women inspectors? A. I think you need to

Plaintiff's Exhibit 58.
Deposition of Seth J. McKibbin—Direct.

understand that there was no schedule at that time. We didn't have the same type of business management that we have now, so as a result of the necessity to establish some of this, I have gone back and reconstructed a composite series of rates that were applicable to men and women inspectors during the wartime period.

Now, quite frankly, some of these records I couldn't find, there is a blank spot in here, for example—

• • •

[88] Q. Will you explain what those rates were, Mr. McKibbin, as best you know? A. Well, as best I have been able to reconstruct them, and if I may take a period time, here, as of 7-9-44, I was able to establish that there were men classified as inspectors, Class B, with a hiring rate of $.60, and a maximum of $.85, and men classified as inspector, Class A, at $.90. Women were classified in four different classifications, the lowest of which was inspector—standard ability, with a hiring rate of $.50, and a maximum $.59. Above that was an inspector above standard ability, which had a single rate of $.61, and above that was an inspector-superior ability, that was paid $.63, and there was an inspector-supervisor, outstanding ability, that receive $.65 per hour.

Q. Were these the rates, in effect, then, when the first union contract was signed, to the best of your knowledge? A. These were in effect as of July 9, 1944, which would have been after the contract was signed.

Q. Were they different before the contract was signed? A. Yes. On 7-9-44, there was a general increase, which incorporated in an attendance bonus into the rate, it was

the result of negotiations and had to have the prior approval of the War Labor Board, and it was ultimately approved and negotiated, and it was implemented on July 9, 1944.

• • •

[97] CROSS EXAMINATION by Mr. Zimmerman:

Q. Mr. McKibbin, earlier you testified that women were paid at lower rates than men for inspection work in 1930. Were there any differences in the inspection work performed by the women in 1930 as opposed to that performed by the men? A. Yes, there was a substantial difference, as I understand it.

Q. Well, can you explain what you mean by that? A. Yes. The women, at that time, did no lifting, as such. They had male helpers on the two day shifts who did the heavy work for the female inspectors on those two shifts. On the night shift the male helpers did not exist, and the men did their own lifting, which the women had help on in the day shifts.

Q. So I gather, in addition to the fact that the men worked different hours, that is, they worked the steady night shift, there was also a difference in work? A. Yes, that is my understanding.

• • •

PLAINTIFF'S EXHIBIT 68-A.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Rates Changes—Oct. 21, 1946

EXHIBIT III

FEMALE SCHEDULE FOR DERIVING RATE RANGES AND STEPS

Corning, New York Plants

Wage Group No.	Job Evaluation Points	Trainee Hourly Starting Rate	Intermediate Rate Step	Min. Rate of Rate Range	Rate Steps			Max. Rate of Rate Range
1	Up to 160	.60						.65
2	165-210	.60					.65	.67
3	215-235	.60				.65	.67	.69
4	240-265	.60			.65	.67	.69	.71
5	270-295	.60		.65	.67	.69	.71	.73
6	300-345	.60	.65	.67	.69	.71	.73	.77
7	350-395	.65	.67	.69	.71	.73	.77	.81
8	400-435	.65	.69	.71	.73	.77	.81	.85
9	440-475	.67	.71	.73	.77	.81	.85	.89
10	480-515	.69	.73	.77	.81	.85	.89	.93
11	520-555	.71	.77	.82	.85	.89	.93	.97
12	560-585	.73	.81	.85	.89	.93	.97	1.01
13	590-615	.77	.85	.89	.93	.97	1.01	1.05

Effective January 6, 1946 (Original Schedule Plus 8¢)

PLAINTIFF'S EXHIBIT 68-B.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Rate Change—Oct. 21, 1946

EXHIBIT IV

MALE SCHEDULE FOR DERIVING RATE RANGES AND STEPS

Corning, New York Plants

Effective January 6, 1946 (Original Schedule Plus 10¢)

Wage Group No.	Job Evaluation Points	Trainee Hourly Starting Rate	Intermediate Rate Step	Min. Rate of Rate Range	Rate Steps			Max. Rate of Rate Range
1	Up to 160	.70					.75	.80
2	165-235	.70				.75	.80	.85
3	240-295	.70			.75	.80	.85	.90
4	300-350	.70		.75	.80	.85	.90	.95
5	355-395	.70		.80	.85	.90	.95	1.00
6	400-440	.70	.75	.85	.90	.95	1.00	1.05
7	445-485	.75	.80	.90	.95	1.00	1.05	1.10
8	490-535	.80	.85	.95	1.00	1.05	1.10	1.15
9	540-570	.85	.90	1.00	1.05	1.10	1.15	1.20
10	575-600	.90	.95	1.05	1.10	1.15	1.20	1.25
11	605-630	.95	1.00	1.10	1.15	1.20	1.25	1.30
12	635-660	1.00	1.05	1.15	1.20	1.25	1.30	1.35
13	665-685	1.05	1.10	1.20	1.25	1.30	1.35	1.40
14	690-710	1.10	1.15	1.25	1.30	1.35	1.40	1.45
15	715-730	1.15	1.20	1.30	1.35	1.40	1.45	1.50
16	735-755	1.20	1.25	1.35	1.40	1.45	1.50	1.56
17	760-775	1.25	1.30	1.40	1.45	1.50	1.56	1.62
18	780-795	1.30	1.35	1.45	1.50	1.56	1.62	1.68
19	800-810	1.35	1.40	1.50	1.56	1.62	1.68	1.74
20	815-825	1.40	1.45	1.56	1.62	1.68	1.74	1.81
21	830-845	1.45	1.50	1.62	1.68	1.74	1.81	1.88
22	850-860	1.50	1.56	1.68	1.74	1.81	1.88	1.95
23	865-875	1.56	1.62	1.74	1.81	1.88	1.95	2.02
24	880-890	1.62	1.68	1.81	1.88	1.95	2.02	2.10
25	895-905	1.68	1.74	1.88	1.95	2.02	2.10	2.18
26	910-920	1.74	1.81	1.95	2.02	2.10	2.18	2.26

PLAINTIFF'S EXHIBIT 69.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

CORNING GLASS WORKS

REVISED HOURLY RATE SCHEDULE

CORNING, NEW YORK

GP. No.	RATE SCHEDULE					
NEW	*Trainee Min.*		*2nd*	*Mid*	*4th*	*Max.*
1						1.975
2					1.975(a)	2.015
3				1.975(a)	2.015(b)	2.055
4				2.015(a)	2.055(b)	2.095
5			2.015(a)	2.055(b)	2.095	2.135(c)
6		2.015(a)	2.055(b)	2.095	2.135	2.185
7	2.015(a)	2.055(b)	2.095	2.135	2.185	2.235
8	2.015(a)	2.095	2.135	2.185	2.235	2.285
9	2.015(a)	2.135	2.185	2.235	2.285	2.345
10	2.055(b)	2.185	2.235	2.285	2.345	2.40
11	2.095	2.235	2.285	2.345	2.40	2.475
12	2.135	2.285	2.345	2.40	2.475	2.545
13	2.185	2.345	2.40	2.475	2.545	2.63
14	2.235	2.40	2.475	2.545	2.63	2.69
15	2.285	2.475	2.545	2.63	2.69	2.765
16	2.345	2.545	2.63	2.69	2.765	2.845
17	2.40	2.63	2.69	2.765	2.845	2.925
18	2.475	2.69	2.765	2.845	2.925	2.995
19	2.545	2.765	2.845	2.925	2.995	3.085
20	2.63	2.845	2.925	2.995	3.085	3.18
21	2.69	2.925	2.995	3.085	3.18	3.275
22	2.765	2.995	3.085	3.18	3.275	3.36
23	2.845	3.085	3.18	3.275	3.36	3.465
24	2.925	3.18	3.275	3.36	3.465	3.565
25	2.995	3.275	3.36	3.465	3.565	3.675
26	3.085	3.36	3.465	3.565	3.675	3.785
27	3.18	3.465	3.565	3.675	3.785	3.90

Plaintiff's Exhibit 69.

(a) Time progression increase due after one (1) month at this rate.

(b) Time progression increase due after three (3) months at this rate.

(c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

/pb

June 10, 1964

PLAINTIFF'S EXHIBIT 76-20.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

AGREEMENT

Between

CORNING GLASS WORKS

and the

AMERICAN FLINT GLASS WORKERS' UNION
OF NORTH AMERICA
A. F. L.-C. I. O.
Including Local Union
No. 1000

January 9, 1964

• • •

ARTICLE XII SHIFT DIFFERENTIAL

SECTION 1. Workers employed on shifts starting at 2:00 p.m., 3:00 p.m., and 4:00 p.m., will be paid $0.06 per hour as a premium for such work.

SECTION 2. Workers employed on non-rotating shifts starting at 10:00 p.m., 11:00 p.m. and Midnight will be paid $0.12 per hour as a premium for such work.

SECTION 3. Workers employed on rotating shifts starting at 10:00 p.m., 11:00 p.m., and Midnight will be paid $0.08 per hour as a premium for such work.

• • •

PLAINTIFF'S EXHIBIT 82.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

To:
Mr. W. J. Bradshaw
Mr. R. M. Dorwart
Mr. F. W. Gillen
Mr. D. S. Hall
Mr. P. A. Lang
Mr. J. L. Rhodes
Mr. S. Somers
Mr. G. R. Yeakey

From: Charles A Francik

May 4, 1964

The attached material, Exhibit I, was used for a presentation to Industrial Engineers in the Corning area concerning the Equal Pay Act and its implications. At the same time, Exhibits II and III were distributed to serve as guidance in determining possible Equal Pay Act violations and providing a method by which these could be recorded. Any possible violations were then to be referred back to this office so that there could be an understanding of the Corporation's possible total liability.

In view of the time problem, it is not possible to invite the Industrial Engineers from the branch plants into Corning. As a substitute, it would be wise if you, your Industrial Engineer, and Personnel Supervisor reviewed the attached material (referring any questions which you might have to me) and make a comparison of female to male jobs in your own plant. Once having developed this

information, I would appreciate it if you would record the possible violations and send them to me so that we are better aware of problems in each plant.

The material is as uncomplicated as we can make it at this time, but there are plenty of areas where misunderstanding might develop. If you have any questions, please contact me and we will do our best to assist you.

/caw
Atts.

• • •

EFFECTIVE DATE—EQUAL PAY ACT

S J & H PLANTS		CGW EVALUATION PLANTS		RANDOM RATE PLANTS	
All Corning Plants Bradford Parkersburg Albion Greenville Corning Packaging Co.	6/11/64	Martinsburg Greencastle Danville, Va. Raleigh Buckhannon Penndell	6/11/64	Charleroi Frederick	6/11/64
Wellsboro	1/20/65	Paden City	5/31/65	Cohart-Louisville	12/4/64
Harrodsburg	2/ 1/65				
Muskogee	3/ 1/65				
Central Falls	6/11/65				
Danville, Ky.	6/11/65				

WHERE IS OUR PROBLEM?

Each plant should examine its local situation to develop compliance problems.

By Plants:

Plants using S J & H Evaluation System Discriminatory Wage schedules.

Plants using negotiated rates.

Plaintiff's Exhibit 82.

By Payroll:

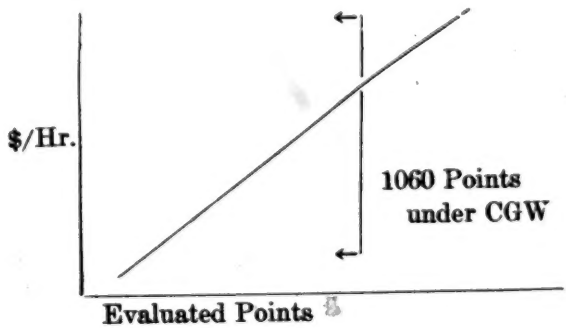
1. Principally Hourly Payroll.
2. Weekly Payroll also affected—look out for:
   a. Quality Control and Lab. Testing where they are on the Weekly Payroll.
   b. "Sleepers"—where job descriptions for male incumbents may contain overstatements of the functions.

By Kind of Work:

Usually low physical effort; look out for:

1. Inspection
2. Quality Control
3. Machine loading and unloading
4. Material transfer
5. Packing
6. Tool & parts supply storage
7. Custodial

By Job Level:



PLAINTIFF'S EXHIBIT 91.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEPOSITION OF ARTHUR J. AGETT

[November 7, 1968]

Appearances:

Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, U. S. Department of Labor, Washington, D. C., on behalf of Plaintiff.

Francis V. LaRuffa, Esq., Chief Trial Attorney, U. S. Department of Labor, 341-9th Avenue, New York, N. Y., on behalf of Plaintiff.

Scott F. Zimmerman, Esq., Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania, on behalf of Defendant.

• • •

---

[3] ARTHUR J. AGETT, was called as a witness and testified as follows:

Examination by Mrs. Cappello:

• • •

[4] Q. During your time in Pressware as Assistant to Plant Manager and Plant Manager in 1942-1945, were they operating a third shift upon which inspectors worked? A. Yes, this was a continuous production operation down there, twenty-four hours a day, seven days a week.

Q. These were the World War II years? A. Yes.

Plaintiff's Exhibit 91.
Deposition of Arthur J. Agett—Direct.

Q. And you have been named as the person qualified to testify as to working conditions and rates during World War II? A. Well, in respect to rates—

Q. Well, working conditions. A. Okay.

Q. Did women inspectors work on the night shift during World War II? A. Yes, as I recall.

Q. Did they get the same base hourly rate as the women on the other shifts? A. Yes.

[5] Q. If this is so, how—since it is so, how were they compensated for working less desirable and inconvenient hours? A. I don't recall that we had any shift differential at that time, and I believe they were not compensated for that purpose, or for that condition.

Q. Were the utility workers on the night shift at this time? A. Does your question relate to, in respect to the inspection work, because you see there are various other operations going on in the plant.

Q. Did the utility workers serve as inspectors on the night shift during this period? A. No, not to my knowledge.

Q. But there were utility workers on the night shift? A. There might have been, I don't recall specifically. There were no utility workers in the inspection department of the night shift, as I recall.

Q. Why was this? A. Well, we used utility workers on the day shift to do lifting and trucking, the work that we didn't expect women to do. This was not necessary on the night shift where we had night inspectors. I don't think we manned any night shifts entirely by women, so that the men would do the moving of boxes, the trucking of ware away, the positioning of skids and boxes adjacent to the inspection area where the women were inspecting?

• • •

PLAINTIFF'S EXHIBIT 93.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

DEPOSITION OF EARLE LEWIS

[November 7, 1968.]

Appearances:

Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, U. S. Department of Labor, Washington, D. C., on behalf of Plaintiff.

Francis V. La Ruffa, Esq., Chief Trial Attorney, U. S. Department of Labor, 341-9th Avenue, New York, N. Y., on behalf of Plaintiff.

Scott F. Zimmerman, Esq., Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania, on behalf of Defendant.

PROCEEDINGS

Whereupon,

EARLE LEWIS was called as a witness and testified as follows:

Examination by Mrs. Cappello:

Q. Are you employed by Corning Glass Works, Mr. Lewis? A. Yes, I am.

Q. How long have you been employed by Corning? A. Since December, 1943.

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

Q. In what capacities have you worked, and what were the approximate dates on which you worked? A. I was working with the Cost Office on special assignments—Central Cost System at the time, for approximately three years; and then I worked as a supervisor of time and cost in "A" factory until 1955; and I went to work in General Industrial Engineering as a Weights Administrator until 1967; and I became a Supervisor of Employment, and non-Exempt Pensions, which is basically a staff position in the General Industrial Engineering Division.

Q. Mr. Lewis, you have been named as the person qualified to testify as to the procedures for posting vacancies. A. Thank you.

Q. Would you please explain those procedures? A. In the first place, vacancy occurs when there is no person who is currently employed has a right to the classification. The procedure is to—for the plant who meets or has a vacancy, to define the job and the wage, send it to the central Personnel Office, where it is verified as being an opening, or a vacancy. It is posted in the plant that needs the person and the main plant Personnel Office—or in the union office window.

Mr. Zimmerman: Let me inject a comment, if I may. Are all jobs posted, Mr. Lewis?

The Witness: No, they are not.

Mr. Zimmerman: All right, just so that you know we are not talking about all jobs.

Please go on.

Mr. LaRuffa: Well, I think you were referring—you had qualified your answer that these are vacancies occurring or positions that don't exist, only—

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

The Witness: If persons do not have a classification.

Mr. LaRuffa: That's right, classification.

Mr. Zimmerman: Off the record.

(Discussion off the record.)

Mr. Zimmerman: On the record.

Mr. LaRuffa: Just give us the situation relative to posting of these positions, those that you do have to post, and those that you don't and why you don't, and why you do.

[5] The Witness: By negotiations with the union, there are certain jobs that are entry jobs and these jobs do not have to be posted. They may be filled from the street when there are openings or they may be filled by regression of persons or they may be filled by a new word, transfer request.

By Mrs. Cappello (continuing):

Q. Are Class B and general TV jobs posted? A. They are not.

Q. Then how can anyone bid on one of these jobs? A. They fill out what is known as a transfer request. They request the plant, the shift and the job that they would like.

Q. And you consider that bidding on a job? A. This is the equivalent, yes, and they are recognized before people are hired from the streets, or who are put on the job under voluntary procedures.

Mr. LaRuffa: This is a totally voluntary procedure that is followed by Corning?

The Witness: Yes.

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

Mr. LaRuffa: Not at as a result of union negotiations?

The Witness: They have agreed to all of our procedures, yes, sir.

Mr. LaRuffa: When did this go into effect, Mr. Lewis?

[6] The Witness: This I don't know. I have not been in the business that long.

Mr. Zimmerman: Perhaps you can give us the earliest point at which you know it was in effect?

The Witness: Around 1950, I would say.

By Mrs. Cappello (continuing):

Q. Do you know how many women have requested transfers to the night shift—any Class C, B, TV or general TV inspectors who have requested transfers to the night shift?

A. May I read—

Mr. Zimmerman: This is some work that Mr. Lewis did pursuant to the request that I made after you suggested it.

The Witness: How would you like the presentation?

By Mrs. Cappello (continuing):

Q. Well, I just want to know how many women have requested transfers to the night shift?

Mr. Zimmerman: You have it broken by time periods?

The Witness: Right, in my plans.

• • •

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

[7] By Mrs. Cappello:

Q. Have many of these requests for the transfers of a night shift been because the women wanted the higher rate?

Mr. Zimmerman: If you know why the women put in the request.

The Witness: I do not know.

By Mrs. Cappello:

Q. I believe it appears on those transfer requests. A. They are on there, yes. I don't know what all of the reasons are.

Q. Would you like to look through them? A. I would have to to give you an answer.

Q. Would you look through them to see if they requested the night shift because they wanted the higher rate?

Mr. Lewis, we are just talking about night shift inspection jobs in the Class C, Class B, TV and general TV. A. This is all this is.

Q. Would you like to stipulate—

[8] Mr. Zimmerman: Yes, we will stipulate that among those women who requested transfers to the night shift during the period of time that Mr. Lewis has testified about, that some did so because they desired to receive a higher rate of pay at night.

• •

Q. Do you know the number who requested night jobs in those classifications?

• • •

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

[10] By Mrs. Cappello (continuing):

Q. Mr. Lewis, would you continue with your testimony, please. A. Yes.

I would like to explain the terms which we are going to use. We use the word "assign" for a person who actually was given the job that they requested. We will use the word "out-dated" to indicate that the person either left their current position and no longer could be considered for this job, or that the six months that is stated on the application expired. We will use the word "refused" for any person who was given the opportunity and they turned it down when we were going to give it to them.

I will take this by years. Women who requested night work in 1966 were fifteen. Four of them were given the job, assigned, eleven out-dated. There were two women in 1966 who requested any shift. When given the opportunity, they refused. 1967, there were sixty-one women requested night work; assigned, thirty-four; out-dated, twenty-two; and refused, five. There were fifty-three women in 1967 who requested any shift. There were four assigned, twenty-nine out-dated, and twenty refused. 1968, to date, there were [11] fifty-two women requested work, there were thirty-four assigned, ten out-dated, eight refused. There was likewise, twenty-seven women who requested any shift, there were seven assigned, nine out-dated, and eleven refused.

Q. Mr. Lewis, would a transfer request become out-dated if, within six months no vacancy had occurred? A. That is correct.

Mr. LaRuffa: This is with respect to women, the figures that you have given me?

Plaintiff's Exhibit 93.
Deposition of Earle Lewis—Direct.

The Witness: Every thing is in respect to women.

Mr. LaRuffa: Are there any records similarly kept for men who have requested to day, do you have those?

The Witness: Yes, again we will have an arithmetic problem, they are on the same sheet.

Mrs. Cappello: Off the record.

(Discussion off the record. And a five minute recess was taken.)

Mrs. Cappello: On the record.

The Witness: In 1966, nine men requested work, nights, and no men requested any shift. All nine were out-dated. 1967, twenty-three requested night work.

Mr. LaRuffa: You mean requested day work?

The Witness: No, they requested night transfers: that is what you requested.

Mr. LaRuffa: From night to day.

[12] The Witness: No, we have no records to show that, as far as I know, do we?

Mrs. Cappello: I didn't think we asked him for that.

Mr. LaRuffa: Well, that is the question I asked. These are night employed—night men who requested transfers from inspection to other departments.

• • •

PLAINTIFF'S EXHIBIT 97.

UNITED STATES DISTRICT COURT

WESTERN DISTRIT OF NEW YORK

(Case title omitted in printing.)

INDUSTRY WAGE SURVEY

PRESSED OR BLOWN GLASS AND GLASSWARE

May 1964

Bulletin No. 1423

UNITED STATES DEPARTMENT OF LABOR
W. WILLARD WIRTZ, *Secretary*
Bureau of Labor Statistics
Ewan Clague, Commissioner

TABLE 22. PRESSED OR BLOWN GLASS AND GLASSWARE, EXCEPT CONTAINERS: SHIFT DIFFERENTIAL PRACTICES

(Percent of production workers by shift differential provisions,[1] United States and selected regions, May 1964)

Shift differential	United States[2]	Middle Atlantic	Border States	Great Lakes
Second shift				
Workers in establishments having second-shift provisions	93.4	94.1	86.9	97.1
With shift differential	86.0	94.1	66.0	97.1
Uniform cents per hour	81.6	94.1	66.0	85.2
1 cent	1.9	–	–	5.3
3 cents	14.2	19.2	20.0	7.7
4 cents	3.0	–	–	8.3
5 cents	.6	–	2.5	–
6 cents	27.8	51.6	19.0	9.9
8 cents	26.0	11.7	24.5	44.4
9 cents	3.5	–	–	9.6
10 cents	4.1	11.6	–	–
15 cents	.5	–	–	–
Uniform percentage	4.3	–	–	11.9
10 percent	4.3	–	–	11.9
With no shift differential	7.4	–	20.9	–

Plaintiff's Exhibit 97.

Third or other late shift				
Workers in establishments having third- or other late-shift provisions	87.8	94.1	71.3	91.7
With shift differential	82.5	94.1	59.7	91.7
Uniform cents per hour	78.2	94.1	59.7	79.8
1 cent	1.9	–	–	5.3
3 cents	12.4	19.2	16.2	4.9
6 cents	2.1	–	–	5.7
8 cents	27.8	51.6	19.0	9.9
10 cents	4.1	11.6	–	–
12 cents	29.5	11.7	24.5	54.1
15 cents	.5	–	–	–
Uniform percentage	4.3	–	–	11.9
10 percent	4.3	–	–	11.9
With no shift differential	5.2	–	11.5	–

[1] Refers to policies of establishments either currently operating late shifts or having provisions covering late shifts.

[2] Includes data for regions in addition to those shown separately.

NOTE: Because of rounding, sums of individual items may not equal totals.

TABLE 23. PRESSED OR BLOWN GLASS AND GLASSWARE, EXCEPT CONTAINERS: SHIFT DIFFERENTIAL PRACTICES

(Percent of production workers employed on late shifts by amount of pay differential, United States and selected regions, May 1946)

Shift differential	United States[1]	Middle Atlantic	Border States	Great Lakes
Second shift				
Workers employed on second shift	17.5	15.4	11.1	23.3
Receiving shift differential	16.3	15.4	9.0	23.3
Uniform cents per hour	15.2	15.4	9.0	20.4
1 cent	.6	–	–	1.7
3 cents	.7	1.5	–	.4
4 cents	.7	–	–	1.9
6 cents	4.1	7.4	3.3	1.3
8 cents	7.1	3.7	5.7	12.3
9 cents	1.0	–	–	2.8
10 cents	1.0	2.8	–	–
15 cents	.1	–	–	–
Uniform percentage	1.1	–	–	2.9
10 percent	1.1	–	–	2.9
Receiving no shift differential	1.2	–	2.1	–

Plaintiff's Exhibit 97.

Third or other late shift				
Workers employed on third or other late shift	14.0	11.1	9.4	19.7
Receiving shift differential	13.0	11.1	7.2	19.7
Uniform cents per hour	11.9	11.1	7.2	16.7
1 cent	.5	–	–	1.4
3 cents	.5	1.1	–	.1
6 cents	.2	–	–	.5
8 cents	2.1	3.7	1.6	.7
10 cents	.8	2.2	–	–
12 cents	7.7	3.7	5.6	14.1
15 cents	.1	–	–	–
Uniform percentage	1.1	–	–	2.9
10 percent	1.1	–	–	2.9
Receiving no shift differential	1.0	–	2.2	–

[1] Includes data for regions in addition to those shown separately.

NOTE: Because of rounding, sums of individual items may not equal totals.

* * *

APPENDIX A. SCOPE AND METHOD OR SURVEY

Scope of Survey

The survey included establishments primarily engaged in manufacturing glass containers for commercial packing and bottling, and for home canning, and those primarily engaged in manufacturing other glass and glassware, pressed, blown, or shaped from glass produced in the same establishment (industries 3221 and 3229, except textile glass fibers, as defined in the 1957 edition of the *Standard Industrial Classification Manual*, prepared by the U. S. Bureau of the Budget).

The establishments studied were selected from those employing 20 workers or more at the time of reference of the data used in compiling the universe lists.

The number of establishments and workers actually studied by the Bureau, as well as the number estimated to be in the industry during the payroll period studied, are shown in the table below.

Plaintiff's Exhibit 97.

Estimated Number of Establishments and Workers Within the Scope of Survey and Number Studied, Pressed or Blown Glass and Glassware Industries,[1] May 1964

Industry and region[2]	Number of establishments[3]		Workers in establishments			
	Within scope of study	Studied	Within scope of			Studied
			Total[4]	Production workers	Office workers	Total
All establishments:						
United States[5]	216	122	97,089	81,748	5,774	78,187
Middle Atlantic	58	29	33,935	27,375	2,755	27,376
Border States	45	23	14,135	12,268	787	10,676
Southeast	11	8	4,611	4,050	128	3,845
Southwest	17	12	4,814	4,140	238	3,753
Great Lakes	59	35	30,325	26,390	1,409	26,286
Pacific	23	12	8,439	7,318	407	5,421
Glass containers establishments:						
United States[5]	104	70	59,389	51,848	2,606	48,394
Middle Atlantic	30	18	19,205	16,689	927	15,482
Border States	9	7	5,916	5,110	315	5,456
Southeast	11	8	4,611	4,050	128	3,845
Southwest	12	9	3,798	3,280	148	3,191
Great Lakes	23	16	17,407	15,382	678	14,830
Pacific	18	11	8,244	7,158	402	5,382
Other pressed or blown glass and glassware establishments:						
United States[5]	112	52	37,700	29,900	3,168	29,793
Middle Atlantic	28	11	14,730	10,686	1,828	11,894
Border States	36	16	8,219	7,158	472	5,220
Great Lakes	36	19	12,918	11,008	731	11,456

[1] Establishments primarily engaged in the manufacture of textile glass fibers were excluded.

[2] The regions used in this study include: *Middle Atlantic*—New Jersey, New York, and Pennsylvania; *Border States*—Delaware, District of Columbia, Kentucky, Maryland, Virginia, and West Virginia; *Southeast*—Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee; *Southwest*—Arkansas, Louisiana, Oklahoma, and Texas; *Great Lakes*—Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin; and *Pacific*—California, Nevada, Oregon, and Washington.

[3] Includes only establishments with 20 workers or more at the time of reference of the universe data.

[4] Includes executive, professional, and other workers excluded from the separate production and office worker categories.

[5] Includes data for regions in addition to those shown separately. Alaska and Hawaii were not included in the study.

* * *

AMENDED ANSWER.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

Defendant, Corning Glass Works, files the following Amended Answer to the Complaint in the above-captioned case:

1. The averments of Paragraphs I, II and III of the Complaint are admitted.

2. The averments of Paragraphs IV, V and VI of the Complaint are denied.

AFFIRMATIVE DEFENSES

3. The payments made to steady night shift inspectors were and are based upon a factor other than sex.

4. To the extent that the Complaint states a claim prior to November 1, 1964, it is barred by the statute of limitations.

WHEREFORE, Defendant prays that the Complaint be dismissed.

Respectfully submitted,

JOHN G. WAYMAN,
SCOTT F. ZIMMERMAN,
REED, SMITH, SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Counsel for Corning Glass Works.

[Filed, July 10, 1970]

JULY 10, 1970, OPINION OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE P. SHULTZ, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 1967-29.

Appearances

Francis V. LaRuffa, Chief Trial Attorney, and Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, United States Department of Labor, Attorneys for the Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel), Pittsburgh, Pennsylvania, for the Defendant.

The Secretary of Labor commenced this action under the provisions of Section 17 of the Fair Labor Standards Act (29 U. S. C. § 217) to enjoin violations of Section 6(d) [29 U. S. C. § 206(d)] of the Act, and to restrain any withholding of payment of wages found by the court to be due to employees under the Act.

The plaintiff, George P. Shultz, Secretary of Labor, sues on behalf of all Class C, Class B, TV, and General TV inspectors working during periods pertinent in this lawsuit. Class B inspectors and Class C inspectors perform their functions in A Factory and in B & C Factory [also referred to herein as B Factory]. TV inspectors and General TV inspectors function in the Pressware plant.

This dispute arose because of the higher base wage rates paid to inspectors working on the steady night shift who allegedly performed work equal to that performed by inspectors on the day and afternoon shifts. Prior to June 1, 1966, except during World War II, only female inspectors worked in the disputed jobs on the day and afternoon shifts, and only male inspectors worked on the steady night shift.

The defendant's employees represented by the plaintiff include both male and female inspectors in the various job categories. Those male inspectors who did inspection work on the day and afternoon shifts after June 11, 1964, the effective date of the Equal Pay Act, are damaged monetarily if the violation charged is proven because, absent a violation, the base rate for the day and afternoon shifts would equal the higher base rate paid at night.

Section 6(d), commonly known as the Equal Pay Act, was enacted on June 10, 1963, to be effective one year thereafter. Section 6(d) (1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a

rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

To carry its burden of proof, the plaintiff must establish by a fair preponderance of the evidence these elements:

(1) The disputed jobs entail equal work, that is, the performance of these jobs, under smiliar working conditions, require equal skill, effort, and responsibility;

(2) Within the same establishment, the defendant pays employees doing equal work a different wage rate;

(3) The different wage rates are paid on account of sex.

The four exceptions to the Act have been held to be affirmative defenses which must be pleaded and proven by a defendant-employer. *Wirtz v. Basic, Inc.,* 256 F. Supp. 786 (D. Nev. 1966). Finally, an employer may not decrease any employee's pay rate to come in comformity with the Act.

In its original answer, the defendant denied that the work performed by the men and women involved in this lawsuit was equal. After the trial, the defendant moved, pursuant to Rule-15 of the Federal Rules of Civil Procedure, for an order permitting it to amend its answer to conform to the evidence. The proposed amendments are: (1) "The payments made to steady night shift inspectors were and are based upon a factor other than sex;" (2) "To the extent that the complaint states a claim prior to November 1, 1964, it is barred by the statute of limitations." Defendant's motion to amend its answer is granted.

At the beginning of the trial, the parties stipulated that the statute of limitations barred all claims arising prior to November 1, 1964. Accordingly, any award for back pay should be computed commencing on November 1, 1964.

The court has considered the extensive memoranda of law submitted by the parties. What follows constitutes this court's findings of fact and conclusions of law.

ESTABLISHMENT

All three plants are separate, making different products. A Factory is engaged primarily in the production of pyrex products, B & C Factory in the production of optical products, and the Pressware plant in the production of television products.

A Factory and B & C Factory share an office building, are located back to back, and are connected by passageways. The Pressware plant is about one-half mile away from the other two.

Each plant is an independent manufacturing unit, having its own management and engineering staff and a separate payroll department.

A central employment office where all prospective employees make their original applications services all Corning area plants. As a particular plant needs new workers, a final pre-employment interview is conducted at the separate personnel office of the plant, where the decision is made to accept or reject the applicant for employment. After employment, an employee, by exercising his seniority rights, may transfer from one plant to another. However, a transfer from A Factory or B Factory to Pressware, or back to A Factory or B Factory from Pressware, is unusual since Class C and Class B inspectors work only in A Factory or B Factory, and TV and General TV inspectors work only in the Pressware plant.

Most employees at Corning, including the inspectors, are represented by the American Flint Glass Workers of North America, Local 1000. One collective bargaining agreement covers all Corning area plants. All payroll checks are written on a computer on information supplied by each plant.

The court finds that A Factory and B & C Factory constitute one establishment, and that the Pressware plant constitutes a separate establishment within the meaning of the Equal Pay Act. The reasons for this holding are that Pressware is separated from the other two plants, and because the inspectors do not transfer back and forth between the Pressware plant and the other two plants. *Phillips v. Walling,* 324 U. S. 490 (1944); *Mitchell v. Bekins Van & Storage Company,* 325 U. S. 1027 (1957), 29 CFR 800.108.

HISTORY.

Steady night shift inspection jobs were added to existing rotating day and afternoon shift inspection jobs some time between 1925 and 1930, when the introduction of automatic production equipment made it necessary to inspect wares on three shifts. At that time, New York State law prohibited the employment of women between the hours of 10:00 P. M. and 6:00 A.M.[1] The defendant did not pay additional wages in 1930 as a shift differential. However, in order to obtain male employees willing to perform what was regarded by the male employees as female work, the defendant had to pay the male employees a higher rate than it paid female employees who performed inspection work on the day and afternoon shifts. This higher base rate for steady night work was never paid for inspection work on the day and afternoon shifts until January 20, 1969, when the company and the union agreed to equalize base rates on all three shifts with payment retroactive to November, 1968.

Beginning in the early 30's, some inspectors at some stations on the steady night shift performed their own "utility work" which entailed, among other things, carrying heavy loads from the end of the lehr. Similar work on the day and afternoon shifts was performed by utility workers assigned to assist the female inspectors.

Because of the manpower shortages during World War II, the defendant employed some women as steady night shift inspectors. These female night inspectors performed their own utility work, including the moving of boxes, the

---

[1] Law of March 30, 1927, ch. 453, § 172 [1927] N. Y. Laws; Law of April 28, 1930, ch. 868, § 172 [1930] N. Y. Laws (which carried forward, without change, the prohibition against night work by females).

trucking away of ware and the positioning of skids and boxes adjacent to the inspection area. They received a higher rate of pay than the day and afternoon inspectors and the same rate paid to male night inspectors, if and when they performed all the work ordinarily required of a male night inspector.

After World War II, Corning returned to the prior practice of employing only males in the steady third shift inspection jobs.

In 1944, the American Flint Glass Workers Union of North America negotiated a collective bargaining agreement covering many production and maintenance employees of the defendant's plants located in Corning, New York. This contract covered the inspectors employed at A Factory, B & C Factory, and the Pressware plants, and it provided for a steady night shift wage differential as a premium for night work. This differential was applicable to inspectors as well as most other hourly employees of the defendant.

In addition to the steady night shift wage differential, this contract continued in effect the existing differential in base wage rate between the steady night shift inspectors and the rotating day and afternoon shift inspectors. Between the years 1944 and 1968, all collective bargaining agreements entered into by the defendant with the union have maintained similar wage differential structures with minor variations caused by negotiation of percentage rather than flat rate increases.

In 1953, New York State law was amended to provide, for the first time, that females over twenty-one years of

age could work after midnight in factories operating multiple shifts, where the Industrial Commissioner found that satisfactory conditions exist and granted his approval.[2] Similar provisions of the law have remained in effect during all times pertinent in this lawsuit.[3]

There is no evidence offered by either side that the Industrial Commissioner ever granted permission to the defendant to employ females on the steady night shift prior to June 1, 1966. From the fact that women actually worked the night shift inspection jobs after June 1, 1966, the court infers that the defendant obtained the necessary permission from the Industrial Commissioner. Further, the defendant has failed to offer any explanation of what, if any, efforts were made to obtain this permission at an earlier date.

MERGER OF RATE SCHEDULES

Prior to June 11, 1964, the defendant maintained separate "male" and "female" rate schedules. Under these separate rate schedules, male inspectors working the steady night shift were paid a higher hourly base rate than the rotating day and afternoon female inspectors who were in the same job category, performing work rated substantially equal by defendant's own job evaluation plans.

---

[2] Law of April 13, 1953, ch. 708, § 172 [1953] N. Y. Laws (which amended section 172 to allow, for the first time, night work for females upon approval by the Industrial Commissioner).

[3] During the period pertinent in this lawsuit, New York Labor Law, Section 173(3)(a)(1), effective October 1, 1963, carried forward the effect of the 1953 amendment allowing night work by females after the required approval. N. Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

Effective June 11, 1964, the defendant merged these separate schedules into one revised rate schedule. This merger, however, preserved the differential in base rate between the men and the women inspectors on all three shifts. This difference was preserved by placing the women into a lower labor grade on the revised rate schedule with a lower rate of pay.

A comparison of the separate schedules and the single revised schedule illustrates how the difference was maintained.

The female rate schedule dated November 19, 1962 indicates that a Class C female inspector was in group 3 (*i.e.*, the wage group of female employees whose jobs were evaluated between 215 and 235) and was paid $1.89 to $1.97½. On the merged rate schedule, Class C female inspectors were classified as "new group" 1, and their rate of pay was $1.97½.

The *male* rate schedule dated November 19, 1962 indicates that a Class C male inspector, working nights, was classified in wage group 2 (*i.e.*, that group of male employees whose jobs were evaluated between 165 and 235) and was paid $1.99 to $2.13½. On the merged rate schedule, the former male rates were maintained by placing the Class C male inspector in "new group" 5, with rate range of $2.01½ to $2.13½.

The Class B inspectors and the General TV inspectors, male and female, were affected similarly by the merger of rate schedules.

Therefore, the merger continued the historical difference in base hourly rates of the men and women inspectors

working the three shifts. In the case of Class C and TV inspectors, the base rate differential between men and women inspectors was 16¢ an hour. For Class B and General TV inspectors, the hourly differential was 18¢. In the years after June 11, 1964, the hourly base rate differential was gradually increased.

SENIORITY LISTS

Before June 1, 1966, defendant had maintained separate "male" and "female" seniority lists. In effect, these separate lists made it impossible for a female inspector to transfer into a steady night-time traditionally male inspection job.

Effective July, 1965, the Civil Rights Act mandated equal employment opportunities without regard to an employee's sex.[4] On May 31, 1966, the defendant abandoned its separate seniority lists, thus affording female inspectors an opportunity to take higher paid night shift inspection jobs as they become available. After June 1, 1966, a number of female employees availed themselves of the opportunity to use seniority to take the higher paying night shift inspection jobs. Of course, they also received the Corning-wide night-time differential provided by the collective bargaining agreement. Also since June, 1966, some men inspectors have taken day and afternoon inspection jobs with the reduced base hourly wage rate. This abandonment of the separate seniority lists was accomplished by mutual agreement between the union and defendant.

---

[4] Civil Rights Act, 42 U. S. C. A. § 2000 e-2 (1970) (statute effective one year after July 2, 1964).

EQUALITY OF WORK— JOB EVALUATION PLANS: ADMISSIBILITY AND ANALYSIS

In attempting to meet its burden of proving the equality of the disputed inspection jobs on all three shifts, the plaintiff has relied heavily on two job evaluation studies conducted by the defendant. These evaluation studies rate the disputed work equal on all three shifts.

In a pretrial statement analyzing the plaintiff's proposed exhibits and giving reasons for objections, which the court required the defendant to submit, no objection was made to Exhibits 34 to 41, and Exhibits 42 to 46 were objected to only on the grounds of relevancy and materiality. During the trial, the defendant objected only on the grounds of relevancy and materiality to the admission of plaintiff's Exhibits 34 to 46. In its post-trial memorandum, defendant for the first time raises additional objections to these exhibits, claiming that the records are hearsay, that they are not business records kept in the regular course of business, and that a proper foundation was not laid for their admissibility.

Since these grounds were not asserted definitely during the trial, the defendant has waived its right to object on these grounds. 2B Barron & Holtzhoff, Federal Practice and Procedure, § 1021, at pp. 309-319 (C. A. Wright rev. 1961). If the defendant's objection had been made clear at the time of trial, the plaintiff would have had an opportunity to clear up any deficiency which was present in the offer.

Furthermore, the purpose of Title 28, United States Code, Section 1732, the Federal Business Records Act,

"is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making the reports." *United States v. New York Foreign Trade Zone Operators*, 304 F. 2d 792 (2d Cir. 1962). "The statute was designed to bring the realities of business and professional practice into court in usable form . . ." *Korte v. New York, N. H. & H. R. R.*, 191 F. 2d 86, 91 (2d Cir. 1951).

The records admitted were made and kept in the regular course of business of the defendant by trained observers following guidelines published by the defendant after a careful study had been made of the problems involved in evaluating the jobs. The job descriptions and evaluations were regularly used by the defendant in the course of its business and they were all prepared before the present litigation began.

Considering the purpose of the Federal Business Records Act, the reliability of these records was well established. Thus, defendant's objections to the admission of these exhibits is overruled.

It is necessary for the court to examine these studies to determine if the plaintiff has met its burden of proving equality of work.

The Stevenson, Jordan & Harrison Job Evaluation Plan [hereinafter referred to as the SJ&H Plan] was installed in 1946 and, according to the defendant, remained in effect until January 20, 1969. This evaluation plan measured skill, responsibility, and working conditions in evaluating the work performed in different job classifications. The defendant claims it was deficient since it did not take into account the amount of effort required in the

performance of the jobs, or the time of the day the work was performed.

Further, defendant claims that the SJ&H Plan was never used to set wage rates because all base wage rates, including the separate male and female wage curves and the merged base rates, were the result of negotiation between the company and the union. In sum, the defendant contends, a higher base rate was negotiated for the male inspectors on the steady night shift, in spite of the fact that the SJ&H Plan evaluated the work done under the same inspection classification equal on all three shifts.

The court is in accord with defendant's position that plaintiff cannot satisfy its burden of proof by relying on the descriptions used and the evaluation points determined in the SJ&H Plan. The Equal Pay Act requires that, for jobs to be equal, their performance must require "equal skill, effort, and responsibility," and must be performed "under similar working conditions, . . ." The SJ&H Plan did not measure effort. Therefore, the descriptions and evaluations prepared under this plan are insufficient alone to satisfy plaintiff's burden of proving the equality of the work.

The plaintiff also relies upon the Corning Glass Works Job Evaluation Plan [hereinafter referred to as CGW Plan], and the descriptions of the jobs made under this plan to satisfy its burden of proof.

The CGW Plan was developed over the years commencing in 1957. The CGW Evaluation Manual states that the purpose of the plan was "to establish equitable differences in pay between jobs based on job requirements," and further explains that "through the use of this system, equitable

relationships will be established in terms of job evalu points. When these points are applied to local curves, they will establish the rate range for any job at that location." The CGW Plan measured e skill, responsibility, and working conditions. Like SJ&H Plan, the CGW Plan does not take into accou time of day a particular job is performed.

The CGW Plan was first installed to establish wag a branch plant in 1960 and, since that time, it has installed at 24 branch plants. There was discussio tween the company and the union in 1962 concernin use at Corning. According to the defendant, this of use the plan in Corning was rejected by the uni 1962 and on five subsequent occasions. The reason the rejection by the union are unknown to the court. N theless, in January, 1969, Corning and the union a that the CGW Plan would be the official job evalu plan at Corning, with rates effective November, 196

Although the plan was not in effect until the latter p 1968, the Industrial Engineering Department at Co prepared descriptions of several of the jobs in qu in this lawsuit and evaluated each of them in accor with the CGW Plan during 1963 and early 1964. this plan, the work in [most of] the job classific disputed in this lawsuit was evaluated as equal three shifts.

Defendant argues that plaintiff's use of the CGW evaluation points and job descriptions also fails to s plaintiff's burden of proof. It is defendant's clain the job descriptions under this plan describe wh inspector is supposed to do, but do not actually de

the work he actually performs. Further, defendant argues that the CGW description and evaluation points are irrelevant prior to January, 1969 when the plan went into effect.

The testimony during the trial and the procedures set forth in the CGW "Guide for Describing And Evaluating" indicate that the first step in the evaluation procedure is an on-the-job observation of the work actually being performed in a certain job classification. Job analysts, together with the employees actually performing the work and their superiors, collaborate in describing the work actually performed. Once this job description is finally drafted, it serves as the basis for job evaluation.

Under this plan, plant supervisors are responsible to report to the job analysts any significant changes in the work actually performed which might affect the originally drafted job description. Obviously, this requirement insures that job descriptions and the resulting job evaluations will be kept as current as possible and reflect the work that is actually being done within a job classification.

The court notes that no CGW job description of TV inspectors in Pressware was admitted in evidence. Further, the product line in Pressware changed in late 1968 resulting in a change in the CGW job descriptions that had been prepared for this plant (*i.e.*, General TV Inspector). Mr. Edward Noble, Manager of Job Evaluation at Corning, testified that the CGW description had been revised, but that this particular job still required equal work on all three shifts.

The defendant also argues that plaintiff may not rely on the CGW job descriptions to show that the jobs in question

are equal under the Act, since the descriptions do not reflect the fact that some male inspectors on the night shift do their own utility work, while some female inspectors on the rotating day and afternoon shifts are assisted by utility workers. Utility workers move inspected material off the lehr, clean up around the inspection stations, pack ware and move it from the inspection area. They are required to exert more manual effort than the inspectors, but their jobs are evaluated at points lower than the inspectors in visual effort, skill, and responsibility.

Specifically, during the years 1964 to 1968, utility workers were assigned to help female day and afternoon inspectors in B Factory when Flameware was being manufactured. Flameware is a pyrex product which is manufactured from 12 to 20 weeks a year. During the years from November, 1964 to June, 1968, 120 female day and afternoon Class C and Class B inspectors worked in B Factory on Flameware. During these same years, as many as 10 and as few as 4 men had been assigned to perform this utility work during a particular year.

The analyst was instructed under the CGW Evaluation Manual to "cover the work normally performed on a regular basis and those duties which require special skills but are performed only occasionally." The analyst was further instructed that "it is not necessary for the description to include every task performed in the past or likely to be performed in the future."

The performance of utility tasks by some inspectors does not make the jobs unequal. In describing and evaluating the inspection jobs, defendant's analysts considered the utility work of so little consequence that these tasks were

not included in the job descriptions of any of the inspectors. For each job classified, the job descriptions are the same on all shifts regardless of whether the work is performed by men or women. Since June 1, 1966, women have been permitted to work on the steady night shift at the same wage rate as the male night inspectors. The conclusion that utility work by inspectors was incidental or "performed only occasionally" is borne out by the fact that defendant has always paid male steady night inspectors at the same rate, whether they performed utility work or not.

Because of these facts, the court concludes that the defendant over-emphasized the role of utility workers in assisting the women during the day and afternoon shifts, and put too much emphasis on the extra work done by the male inspectors during the night shift.

Furthermore, there is other evidence in the case to show the equality of the work. Although he qualified his testimony, Edward W. Noble, manager of job evaluation for the defendant, testified: "There is very little difference from shift to shift," in describing the jobs in question. He did not know what each and every individual did, but he was familiar with the jobs from occasional personal observation and from reports made by job analysts and plant managers who were instructed to report any significant job changes.

The court is satisfied that the most accurate description of what the inspectors actually did is provided by the thoughtful description of the job analyst made under the supervision of the job evaluation manager, in cooperation with the employee himself and his plant manager. Another

reason for their reliability is that these studies were made before there was any hint of litigation.

To hear testimony from a fair sampling of the employees occupying all the disputed jobs on all shifts during the relevant time period would have consumed, in the court's best estimate, many trial days. And there is no reason to believe that the descriptions which the court could have interpolated from all this testimony would reflect the work actually done in any better fashion than the job descriptions drafted under the CGW Plan.

The defendant also argues that the CGW job evaluation is unreliable under Equal Pay Act standards because the time of day the work is performed is not considered in determining the relative similarity in working conditions. However, the defendant pays a Corning-wide differential for night work. In *Wirtz v. Dennison Manufacturing Co.*, 265 F. Supp. 787, fn.1 (D. Mass. 1967), the court said that "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work." This court is in accord that a differential such as the Corning-wide night differential adequately compensates employees for working undesirable times of day and, therefore, rejects the defendant's contention in this respect.

Finally, in a case brought under the overtime provisions of the Fair Labor Standards Act, the Supreme Court pointed out that "the employer . . . is in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson v. Mt. Clemons Pottery Co.*, 328 U. S. 680, 687 (1946). Here

as in *Anderson,* the defendant is in the best position to offer evidence and to explain why the results of its own job evaluation study should not be considered in determining the equality of work on all three shifts. The court concludes that the defendant has failed to offer any persuasive reason why the CGW descriptions and evaluation points should not be relied upon by the court.

Therefore, on all the testimony and exhibits before the court, the court concludes that the CGW job descriptions used for the jobs disputed in this lawsuit reflect the work that is actually being done within the meaning of the Equal Pay Act and the regulations promulgated thereunder. As a result of this, the court further concludes that the evaluation points assigned to the jobs disputed in this case are a valid reflection of the equality of the work performed.

Therefore, the court concludes that the work performed by the inspectors involved in this lawsuit and evaluated under the CGW Plan is equal on all three shifts and has been so since November, 1964, within the meaning of the provisions of the Equal Pay Act.

AFFIRMATIVE DEFENSE

The defendant, as one of its affirmative defenses, claims that the higher base rate paid steady night shift inspectors is "a differential based on any other factor other than sex." The defendant traces the history of the higher base rate on the steady night shift from its creation in 1930, [to its final elimination in January, 1969]. The circumstances causing the creation and perpetuation of the higher rate [until 1969], the defendant argues, explains that the higher rate was a result of a "factor other than sex."

The creation of the night shift inspection jobs was brought about by the advent of automation in the glass manufacturing business. Inspection work had to be done on all three shifts.

In 1930, women had filled most, if not all, of the inspection jobs on the day and afternoon shifts. New York law did not permit women to occupy night shift jobs. As the defendant explains it, men were less than enthuastic in accepting steady night shift inspection work which they regarded as "women's work."

In addition, the men who were to fill the newly created night inspection positions had been working in the blowing room where they received incentive pay. With their average incentive pay added to their regular wage, they could earn more than the company was paying for inspection work on the day and afternoon shifts.

Because of these factors, it was necessary to pay men a higher rate than women for the night inspection work.

This "differential" in base rate was continued as a result of negotiation until January, 1969, even though the first union contract in 1944 provided for a Corning-wide night shift differential. Prior to June 1, 1966, only male inspectors worked the night shift and received this differential in base rate, plus a night shift differential.

The night shift differential was originally 5¢ an hour and reached 12¢ an hour in 1958. The steady night shift differential represents compensation for the undesirable hours of this shift, which begins at 10:00 P. M., 11:00 P. M., or midnight.

For purposes of this litigation, the defendant has called the differential in hourly base pay a "supplemental escalating shift differential." This term is not used in the agreements and defendant's supervisors who testified had never heard of it and did not understand what it meant.

Citing the interaction between the company and the union, the fact that New York law prohibited night work by women for a long period of time, and the original reasons why a differential in base rate was necessary, the defendant attempts to justify the higher night shift base rate paid to men after June 11, 1964. The court, however, is not persuaded that paying a higher steady night shift rate, a "supplemental escalating shift differential," is justifiable after the effective date of the Equal Pay Act.

The Act was passed in June, 1963 to be effective with respect to defendant's employees in June, 1964. Thus, the defendant had a full year to implement compliance. As of 1953, New York State had lifted its absolute ban on night work by women. As of that year, women could have occupied night work positions if approval by the Industrial Commissioner was sought and obtained. And, although the original basis for the higher base rate on the steady night shift may have been reasonable in 1930, this higher rate could not, in the court's view, be legally maintained under circumstances in this case after the effective date of the Equal Pay Act.

Therefore, the defendant has failed to carry its burden of establishing, by a fair preponderance of the evidence, that the higher steady night shift differential was based on "any other factor other than sex."

SUMMARY

The court concludes that the work performed by the Class C and Class B inspectors in A Factory and B Factory and the work performed by the General TV inspectors in Pressware was equal on all three shifts from November 1, 1964 until January, 1969, and that the higher base rate paid the steady night shift inspectors was maintained after June 11, 1964 on account of sex, in violation of the Equal Pay Act. The court further concludes that the effect of this violation persisted after June 1, 1966. Finally, the court concludes that the higher base rate paid night inspectors was not based on any other factor other than sex

At the trial, the court deferred consideration of the amount of wages allegedly due the day and afternoon inspectors involved in this case. In light of the above findings of fact and conclusions of law, the defendant is restrained from withholding the payment of wages due for the period from November 1, 1964 [to November, 1968, when the inspection base rates were equalized for all three shifts by the January 20, 1969 agreement].

The "supplemental escalating shift differential" in base rate shall be the basis for computing the wages due the Class C and Class B inspectors in A and B Factories and the TV and General TV inspectors in Pressware. There shall be no award for TV inspectors in Pressware.

The parties shall attempt to agree upon the correct amount due for each employee affected by this decision. If the parties cannot agree on the amount of the judgment within a period of sixty days, or such further time granted by order of the court, then the plaintiff shall move on

notice for an accounting by a Master to be appointed by the court.

The plaintiff may at any time renew his application for the issuance of further injunctive relief which may be equitable under the circumstances of this case. Presently, the court has refrained from issuing such further injunction because the inspection rates on all shifts have been equalized by the January 20, 1969 agreement

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: July 10, 1970.

TRANSCRIPT OF PROCEEDINGS, MAY 10, 1971.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

[156] Proceedings held before the Hon. John T. Curtin, United States District Judge, at the United States Court House, Buffalo, New York, resuming on May 10, 1971.

Appearances:

Peter G. Nash, Solicitor of Labor, Attorney for the Plaintiff; Francis V. LaRuffa, Regional Solicitor; Isabelle R. Cappello, Senior Attorney; Laurel J. McKee, Attorney, of Counsel.

Messrs. Reed, Smith, Shaw & McClay, Attorneys for the Defendant; John G. Wayman, Esq., and Scott F. Zimmerman, Esq., of Counsel.

• • •

---

[189] SETH J. McKIBBIN (137 Davis Street, Painted Post, New York) a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Cappello:

• • •

[221] The Court: Mr. McKibbin, the difference there between three o seven and two ninety four or five, you have generally in the plant,—you have your,—what do you call it when someone works nights, the extra money they get, the night shift—

The Witness: Shift differential.

The Court: Night shift differential. Is this a night shift differential?

The Witness: This differential, your Honor, that [222] you refer to, the difference between two ninety four and a half and three o seven as of 11-16-70 is a distinction that we made as part of the January 4, 1969 contract settlement, and in that settlement we agreed that certain employees with certain seniority when they worked the night shift on inspection and other classifications, there would be a specified rate protection program applicable to them and employees with less than the required seniority would not have that protection.

The Court: I see, so that in the contract you also talk about night shift differential?

The Witness: Right.

The Court: And this is different from the night shift differential?

The Witness: It is, your Honor.

• • •

[248] RE-DIRECT EXAMINATION by Mrs. Cappello:

• • •

[257] Q. Now, Mr. McKibbin, what are you today calling the higher rate that is being paid to the night shift inspectors? A. I am not calling it anything.

Q. Well, you have referred to a protective rate. A. The rate is protected.

Q. Now, what is the difference between the supplemental escalating shift differential, the additional [258] red circle differential and the protected rate that the night shift inspectors receive.

Mr. Zimmerman: Your Honor, I object to that question because it calls for a legal conclusion on the part of the witness. The facts speak for themselves and he has testified to what the facts are.

The Court: Overruled.

The Witness: I am not sure that there is too much in common between the two. As I indicated before, the escalating shift differential phrase was something that we propounded in response to your Interrogatory to describe what happened, and I feel that that term is an accurate reflection of what existed at the time that our answer was propounded.

• • •

[259] The Witness: The second phrase that you used, that you cite there, covers a different period of time, a different monetary differential, if you will, and was a result of a new agreement with the union and as far as I am concerned, has little bearing on the former phrase which you apparently didn't like anyway. The third thing is a protected rate. It isn't a differential at all, if I understand what your state-

ment was. You are comparing two differentials at different points in time with a rate at still a different point in time.

By Mrs. Cappello:

Q. Are you finished? A. I am finished. Thank you.

Q. Do all these terms refer to the higher rate which the steady night shift inspectors received? [260] A. At different points in time.

Q. And what is the reason for this higher rate on the night shift? How did that get started? A. At what point in time?

Mr. Zimmerman: Which one are we referring to, your Honor?

The Court: We have two people. If there is an objection, I overrule the objection. At what point in time, Mrs. Cappello?

By Mrs. Cappello:

Q. Throughout this litigation the night shift inspectors have received a higher rate, throughout the entire course of the litigation. Why have they received a higher rate? A. I think the only answer I can give, that is the way we have negotiated.

Q. Does it go back to the period in 1925 or 1930 when the men had to be put on the night shift to do inspection work and they wouldn't work at the female rate? A. There was a historical relationship that goes back that far.

• • •

[275] Q. Would you read the question, please?

(Whereupon, the pending question was read as follows:

"Q. Mr. McKibbin, I am now going to show you a document that has been marked as Plaintiff's Exhibit 104, and it was furnished to us pursuant to a subpoena for the records showing the names and service dates of [276] employees currently on lay-off and subject to recall as Class C, Class B or General TV Inspector in A Factory, B Factory or Pressware. I counted five hundred fifty four names, Mr. McKibbin, in that exhibit. Would you compare that exhibit to Exhibit 103 and tell me whether five hundred fifty four people, or however many are shown in this Exhibit 102, would have to be offered the job of Class B, Class C or General TV Inspector before any of the employees named in Exhibit 103 would be offered that job, and I assume you could do that by the service dates?")

The Witness: I am sure it can be done by service dates, but since this list is not in service dates sequence and I haven't physically counted them, I can't, unless you want me to take the time to do it.

• • •

[289] Q. Mr. McKibbin, we were talking about Plaintiff's Exhibit 104 that has been marked for identification and it shows the records, or it was furnished to as pursuant to a subpoena for records showing the names and service dates of employees currently on lay-off and subject to recall. That is Class C, Class B or General TV Inspector in A Factory, B Factory or Pressware. Can we, by looking at the service dates in this exhibit, tell the employees who have been hired since January 20, 1969, and subtract that number from the rest of the employees and then be able to figure out how many employees would have

to be offered these jobs before any new hires cou
offered the job, and that is new hires since Janua
1969? A. Yes.

[290] Mrs. Cappello: Your Honor, we have d
count on this and Mr. McKibbin won't verif
figures because he didn't count it, but we count
hundred fifty employees; twelve who have
newly hired since January 20, 1969, which
that five hundred forty three would have
offered these jobs before any new hires coul
them.

The Witness: Your Honor, in our conver
I asked that we also observe that that does not
that it is improbable that it couldn't happen b
many of the people in the five hundred numb
she is talking about may have left the area or
employment elsewhere or not be interested f
reason or another.

The Court: Certainly there would be, Mrs
pello. I am sure you must agree there wo
built into this five hundred figure a large di
for lack of interest, moving, health reasons,
reasons and many other reasons.

[291] The Witness: Yes.

By Mrs. Cappello:

Q. How long are these employees kept on this
list, Mr. McKibbin, after a certain number of year
they refuse the job, don't you drop them? A. I thin
three years, thirty six months, something like tha
their last day worked.

• • •

PLAINTIFF'S EXHIBIT 101.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

[Regarding proceedings of May, 1971]

DEFENDANT'S ANSWERS TO PLAINTIFF'S REVISED REQUESTS FOR ADMISSIONS AND THIRD SET OF INTERROGATORIES.

1. Wage rate schedules in effect since November 1967 and implementation of the wage adjustments of the collective bargaining agreement of January 4, 1969, resulted in Class C and Class B inspectors in A Factory and B Factory being paid at the following maximum rates on the indicated dates and shifts:

	11/67 to 11/4/68	11/04/68 to 11/11/68	11/11/68 to 11/ 3/69	11/ 3/69 to 1/05/70	1/5/70 to Present
Class C, night shift	$2.46	$2.66	$2.68	$2.80	$2.83
Class C, day and afternoon shifts	2.29	2.49	2.64	2.76	2.79
Class B, night shift	2.57½	2.77½	2.79½	2.91½	2.95
Class B, day and afternoon shifts	2.370	2.57	2.68	2.80	2.83

Answer

1. Denied.

The collective bargaining agreement of January 4, 1969, and the Corning Glass Works Job Evaluation Plan eliminated the job classifications of Class C Inspector, Nights and Class B Inspector, Nights and resulted in adjustments to the base wage rates (maximum) of the jobs of Inspector Class C and Inspector Class B in A and B Factory as follows:

	Base Wage Rate from 11/1/67 through 1/5/69	Base Wage Rate Resulting From Agreement of 1/4/69 through 11/2/69	Base Wage Rate from 11/3/69 through 1/4/70	Base Wage Rate from 1/5/70 through 11/1/70	Base Wage Rate from 11/2/70 through 1/3/71	Base Wage Rate from 1/4/71 through present
Inspector Class C Night Shift	2.46	not in existence	not in existence	not in existence	not in existence	not in existence
Inspector Class C Day & Afternoon Shifts	2.29	not in existence	not in existence	not in existence	not in existence	not in existence
Inspector Class C, All Shifts	not in existence	2.64	2.76	2.79	2.90	2.93
Inspector Class B, Night Shift	2.575	not in existence	not in existence	not in existence	not in existence	not in existence
Inspector Class B, Day & Afternoon Shifts	2.37	not in existence	not in existence	not in existence	not in existence	not in existence
Inspector Class B, All Shifts	not in existence	2.68	2.80	2.83	2.945	2.975

* * *

Plaintiff's Exhibit 101.

2. Wage rate schedules in effect since November 1967 and implementation of the collective bargaining agreement of January 4, 1969, resulted in the General TV inspector in Pressware being paid at the following maximum rates on the indicated dates and shifts:

	11/67 to 11/4/68	11/04/68 to 11/11/68	11/11/68 to 11/03/69	11/03/69 to 12/15/69
General TV, night shift	$2.57½	$2.77½	$2.79½	$2.91½
General TV, day and afternoon shifts	2.37	2.57	2.68	2.80

Answer

2. Denied.

The collective bargaining agreement of January 4, 1969, and the Corning Glass Works Job Evaluation Plan eliminated the job classification of General TV Inspector, Nights, and resulted in adjustments to the base wage rate (maximum) of the job of General TV Inspector as follows:

	Base Wage Rate from 11/1/67 through 1/5/69	Base Wage Rate Resulting From Agreement of 1/4/69 through 11/2/69	Base Wage Rate from 11/3/69 through 12/15/69	
General TV Inspector, Night Shift	2.575	not in existence	not in existence	
General TV Inspector, Day & Afternoon Shifts	2.37	not in existence	not in existence	Job Canceled December 15, 1969
General TV Inspector, All Shifts	not in existence	2.68	2.80	

* * *

PLAINTIFF'S EXHIBIT 101-A.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

(Case title omitted in printing.)

[Regarding proceedings of May, 1971]

DEFENDANT CORNING GLASS WORKS' RESPONSE TO PLAINTIFF'S REQUESTS FOR ADMISSIONS AND THIRD SET OF INTERROGATORIES.

EXHIBIT A TO PLAINTIFF'S EXHIBIT 101-A.

Collective bargaining agreement dated January 4, 1969.

• • •

ARTICLE XII

SHIFT DIFFERENTIAL

SECTION 1. Effective the first Monday after the execution of this Agreement workers employed on shifts starting at 2:00 p.m., 3:00 p.m., and 4:00 p.m., will be paid $.10 per hour as a premium for such work.

SECTION 2. Effective the first Monday after the execution of this Agreement workers employed on non-rotating shifts starting at 10:00 p.m., 11:00 p.m., and Midnight will be paid $0.16 per hour as a premium for such work.

Exhibit A Attached to Plaintiff's Exhibit 101-A.

SECTION 3. Effective the first Monday after the execution of this Agreement workers employed on rotating shifts starting at 10:00 p.m., 11:00 p.m., and Midnight will be paid $0.12 per hour as a premium for such work.

• • •

ARTICLE XXVI WAGE RATES

SECTION 8. Effective November 4, 1968, all hourly wage rates will be increased eight per cent (8%), adjusted to the nearest one-half cent or twenty cents ($.20), whichever is greater, and existing piece rates will be adjusted accordingly.

EXHIBIT B TO PLAINTIFF'S EXHIBIT 101-A.

CGW Job Evaluation Installation Rules.

• • •

9) Any employee who as of the date of the installation of the Corning Glass Works Hourly Job Evaluation Plan is an employe of the Corning area plants covered by the terms of the Basic Agreement and who thereafter by operation of rights under the Basic Agreement continues to hold or takes any of the jobs specified on the third shift shall receive the rates which he or she would have received for that work under preexisting practices. Those jobs being:

Silk Screen Operator
Inspector C
Inspector B
General TV Inspector
Cafeteria Worker

Exhibit B Attached to Plaintiff's Exhibit 101-A.

Persons who become employes after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs.

• • •

EXHIBIT C TO PLAINTIFF'S EXHIBIT 101-A.

Job Evaluation Questions & Answers.

December 27, 1968.

• • •

1) Why was the January 20, 1969, date picked to install Job Evaluation?

Although most jobs have been evaluated under the new system, some have not (less than 10% of the people), the January 20th date was set to allow enough time to get all jobs evaluated before installing the system.

2) How is Job Evaluation retroactivity figured?

Retroactivity is based on the job an employee was working on on November 11, 1968.

3) Does the fact that I was off due to the November 11th Veterans' Holiday affect my retroactivity?

No. Retroactivity in this case would be based on the job for which you were paid as an unworked holiday.

4) How are the general increase of 8% or 20¢ and Job Evaluation increases combined?

The general increase goes into effect first and is retroactive to November 4, 1968. The new job evalua-

tion rates which include the 2¢ go into effect January 20, 1969, and are retroactive to November 11, 1968.

To figure any specific job rate which is increased under job evaluation, first figure the amount of the general increase and add it to the current rate. Then add in the amount of the increase shown on the sheet of rates published during negotiation.

5) What is red circle rate protection?

Red circle rate protection means that under the new plan, there are not enough points to justify paying the current rate for a job. People working on these jobs on the date of the installation of the new plan will continue to be paid the old rate or in other words, get red circle rate protection. This protection applies only to the job an employe is working on on the date of installation.

6) If I am not at the top of my rate and the top rate is red circled, do I get the new lower rate or the old higher rate?

Through normal progression, provided you are on a classified job, you get the old higher rate. You are allowed to progress normally to the old rate and at that time you are given the red circle protection.

If I am at the third step in my rate range and my job goes up in value due to the new Job Evaluation System what is my new rate?

You would go to the third step in the new rate range.

• • •

AUGUST 3, 1971, OPINION OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 1967-29.

CURTIN, *District Judge.*

Appearances:

Francis V. LaRuffa, Regional Solicitor, and Isabelle R. Cappello, Assistant Counsel for Trial Litigation, United States Department of Labor, for Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel) Pittsburgh, Pennsylvania, for Defendant.

Plaintiff brought this suit under the provisions of Section 17 of the Fair Labor Standards Act (29 U. S. C. § 217) to enjoin violation of Section 6(d) of the Act [29 U. S. C.

§ 206(d)], and to restrain the withholding of payment of wages found by the court to be due to defendant's employees under the Act.

After a trial, this court filed a decision on July 10, 1970,[1] ruling that the work of the Class C, Class B, and General TV inspectors was equal on all shifts within the meaning of the Act, that the payment of a lower rate to the day and afternoon shift inspectors was sex-based and illegal, and that men as well as women were damaged monetarily when, after June 1, 1966, men worked at the previously all-female day and afternoon inspector jobs at a reduced base hourly wage rate. During that trial, defendant described the sum paid to night shift workers which was in addition to the regular night shift differential paid to all night workers as a "supplemental escalating shift differential." The court ordered that restitution be paid in that amount to the employees affected from November 1, 1964 until the end of November, 1968. Injunctive relief after that date was denied because, at the time of filing that decision, the court was of the opinion that the rates of all inspectors had been equalized on all shifts by a collective bargaining agreement entered into between the defendant and the Union on January 4, 1969.[2]

On July 17, 1970, plaintiff promptly moved to amend the findings of the court on the ground that the inspection rates on all shifts had not been equalized by the collective bar-

[1] *Shultz v. Corning Glass Works*, 319 F. Supp. 1161 (W. D. N. Y. 1970).

[2] *Id.* at 1171.

gaining agreement.[3] To determine the impact of this agreement upon the wages paid to men and women inspectors on the three shifts, further extensive interrogatories and requests for admissions were filed and answered. In addition, on May 10, 1971, the court heard further testimony. The following constitutes the court's amended and supplemental findings of fact and conclusions of law.

Plaintiff and defendant are generally in agreement about the facts, but sharply dispute the conclusion which the court should draw from these facts. After considering the evidence presented, it is clear now that the court's prior decision that the January, 1969 agreement equalized the rate paid on all shifts to the inspection jobs after November, 1968 was in error.

During November and December, 1968, defendant and Local 1000 of the American Flint Glass Workers Union of North America negotiated a new collective bargaining agreement which was entered into on January 4, 1969. The agreement provided for certain retroactive wage boosts effective in November, 1968. The parties agreed that the Corning Glass Works Job Evaluation Plan, which the court relied upon in its original decision, would become effective on January 20, 1969.

Because the parties are not in dispute about the terms of the agreement or the wages which will be paid as a a result of it, it is not necessary to detail the complicated formula

---

[3] Since July 10, 1970, other motions were also presented to the court. On December 2, 1970, the defendant's motion pursuant to Rule 19 of the Federal Rules of Civil Procedure to add the local and international unions as defendant parties was denied. A motion by plaintiff to include TV inspectors in the award was similarly denied.

used by the parties to set the rates, but, to understand the argument, it is important to summarize the results of the agreement.[4]

The Corning Glass Works Evaluation Plan rated the inspection jobs at issue in relation to the other jobs in the defendant's plant in a fair, non-discriminatory manner not based upon sex. It abolished the separate wage rates for day, afternoon, and night shift inspectors, increased the rate of all inspector jobs, day and night, so that the resulting wage was the same in all three shifts. Further provisions in the agreement, however, resulted in the payment of a higher rate at night to every person employed before January 20, 1969. Because of this "red circle" provision in

[4] Defendant pays the following rates to employees employed on or prior to January 20, 1969 who work as Class B and Class C inspectors:

BASE RATE RESULTING FROM AGREEMENT OF

	11/1/67 through 1/5/69	1/4/69 through 11/2/69	11/3/69 through 1/4/70	1/5/70 through 11/1/70	11/2/70 through 1/3/71	1/4/71 through Present
Class B, night shift	$2.575	$2.80	$2.92	$2.95	$3.07	$3.10
Class B, day and afternoon shifts	2.37	2.68	2.80	2.83	2.945	2.975
Differential	.205	.12	.12	.12	.125	.125
Class C, night shift	2.46	2.68	2.80	2.83	2.945	2.975
Class C, day and afternoon shifts	2.29	2.64	2.76	2.79	2.90	2.93
Differential	.17	.04	.04	.04	.045	.045

The agreement provided that an added retroactive sum payment be made for the period between November 4, 1968 and January 6, 1969. The sum was based on the rate of the employee's job on January 6, 1969. The arrangement was arbitrary and temporary. Plaintiff does not request that a recomputation be made for this period, and none is ordered by the court.

the agreement, all Class C, Class B, and General TV inspectors (until this job was discontinued in December, 1969) working on the steady night shift have continued to receive a higher base wage rate—in addition to the plantwide night shift differential—than their counterparts of comparable seniority working on the day or afternoon shifts. Men or women may work the night shift but, when they transfer to the day or afternoon shifts, they receive less pay. This "red circle" or "protected" rate will not be paid to employees hired after January 20, 1969. However, up to May 10, 1971, the date of the hearing, no one hired after January 20, 1969 had worked at one of the night inspection jobs. It will be some time before the "red circle" rate will be phased out, because there are about 500 employees currently on layoff who must be offered an inspection job before it can be offered to a new employee.

The Company claims that the "red circle" rate was needed because of a policy to protect the rate of a senior employee when his job is reclassified at a lower rate. The Company specifically referred to that section of the agreement which provides that, when "job evaluation . . . results in wage brackets lower than prevailing rates then paid for the job, it is not the intention of the Company to reduce the prevailing base rates of employees currently working on such jobs."[5] A complicated formula in the agreement put this general statement into practical effect, with the result that the night inspection job previously receiving a "supplemental escalating shift differential" now received a "red circle" or "protected" rate. The amount of the "red circle"

[5] Agreement, Corning Glass Works and American Flint Glass Workers' Union of North America, A.F.L.-C.I.O., January 4, 1969, Article XV, Section 2.

rate is smaller than the "supplemental escalating shift differential" but the result of this plan was to continue the prior practice under another name.

In its original decision, the court ruled that, from June, 1964 continuing through June 1, 1966, when women first worked on the night inspection jobs, until November, 1968, day and afternoon inspectors were entitled to be paid the "supplemental escalating shift differential."[6]

If the day and afternoon inspectors had been paid this amount before November, 1968, in January, 1969 when the new agreement was entered into, the day and afternoon inspectors would have received the benefit of the "red circle" rate in the same way that the night shift inspectors did. To state it in another fashion, if defendant had been in compliance with the Equal Pay Act on June 11, 1964, all inspectors would have been paid at the same rate in January, 1969, and all would have received the same increase when the agreement went into effect.

Defendant insists that seniority and not sex discrimination is the reason for the extra pay. Defendant alludes to the fact that both men and women have received the "red circle" protection; that, when women who have been employed before January 20, 1969 work the night shift, they receive the "protected" rate and, when men work the day shift, they work at the reduced rate.[7] Furthermore, defend-

---

[6] 319 F. Supp. at 1171.

[7] There is no question that women as well as men have the opportunity to work at night. Between January 20, 1969 and December 27, 1970, 140 males and 274 females filled 524 vacancies on Inspector Class B jobs on the day and afternoon shifts in A and B Factories. Similarly, 72 males and 80 females filled 179 vacancies on the steady night shift. In the Pressware Plant, 56 males and 158 females filled 380 General TV Inspector vacancies on the day and afternoon shifts, while on the steady night shift 39 males and 46 females filled 114 vacancies.

ant contends that the formula for the "red circle" protection depended upon the payment made to inspectors immediately before the agreement was reached. Since both men and women worked as night inspectors from June, 1966, the defendant's argument is that the "red circle" rate is derived from a wage paid to women as well as men.[8]

However, the court has already found that the payment of the "supplemental escalating shift differential" during the period June, 1966 to November, 1968 was sex based and a violation of the Act. The rates paid during that period were the result of a longstanding practice to pay a lower rate to female inspectors who, for many years, worked only the day or afternoon shifts.[9] During the hearing, defendant admitted that there is an historical connection between the "red circle" rate and the prior "supplemental escalating shift differential."

It is appropriate to apply the principles growing out of the cases arising under Title VII of the Civil Rights Act of 1964 [42 U. S. C. § 2000(a)(2)] to Equal Pay Act cases, since the purpose of both Acts is to eliminate employment discrimination. *Shultz v. Wheaton Glass Co.*, 421 F. 2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

---

[8] Defendant further argues that the January, 1969 agreement does not violate the Act because no rates were reduced, that, instead, the rates of all inspectors were increased. For example, an employee who was performing any of the three inspection jobs on the steady night shift under the wage rate in effect prior to January 4, 1969, and who transferred to the day shift under the wage rate in effect after January 4, 1969 received a wage increase, not a decrease, as a result of the agreement.

This argument is obviously without merit. To find out whether rates are discriminatory, they must be compared on the same day, not on the day before and the day after an increase.

[9] 319 F. Supp. at 1164-65.

Assuming that the formula for payment of wages after January 20, 1969 is a neutral employment practice, one to protect the rate paid to senior employees, nevertheless, if the result of this formula perpetuates past discrimination, it will not be permitted. In *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), a Title VII action, at page 430, the Supreme Court said:

> "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

See also, *United States v. Bethlehem Steel Co.* (2d Cir.) decided June 21, 1971. In that action under Title VII of the Civil Rights Act, the court ordered rate retention for a group which had been discriminated against in employment opportunities. The court explained that it did so "so that the effects of past discrimination would not be perpetuated."

The court finds that, in this case, the "red circle" rate paid to night shift inspectors perpetuates the discrimination of the "supplemental escalating shift differential." The "red circle" rate is not a valid "red circle" rate under the Equal Pay Act. 29 C. F. R. § 800.146.

In order to eliminate the discriminatory rate paid to day and afternoon shift inspectors, the Company shall pay the "red circle" rate to them as well as to night shift inspectors. Defendant is restrained from withholding the payment of wages due for the period from November 1, 1964[10] until the date it equalizes the rate paid to the various inspectors.

[10] The parties agree that the statute of limitations bars relief prior to November 1, 1964. *Id.* at 1163.

The basis for computing the wages due shall be equivalent to the "supplemental escalating shift differential" and the "red circle" differential, depending upon the time period involved. The parties shall attempt to agree upon the correct amount due each employee affected by this decision. If they cannot agree upon the amount of the judgment within a period of sixty days, then the plaintiff is directed to move promptly, on notice, for an accounting by a Master to be appointed by the court. At the same time, the parties are directed to attempt to agree upon the manner of distribution of the award to the employees.

In the court's original decision, the plaintiff's application for an injunction, pursuant to Section 17 of the Fair Labor Standards Act, restraining future violations of the Act was denied with leave to renew. The court is now satisfied that the plaintiff is entitled to this relief. The defendant has been in violation since June 11, 1964. Since January, 1969 when the Company entered into the new agreement, it continued to pay the past discriminatory rate. The Company admits that a similar plan for the payment of inspectors was in force in at least two other plants and, in at least ten plants of the twenty-six, up to May, 1965 it continued to have separate male and female rate schedules. Furthermore, the present collective bargaining agreement at the Corning plant expires on January 20, 1972. Whatever new agreement is entered into, it is important that the negotiations be carried out with the understanding that future violations of the Act may be the subject of contempt proceedings.

Under these circumstances, an injunction should issue for the purpose of the Act is to "correct a continuing offense against the public interest," not simply "to collect a debt

owed by an employer to an employee." *Wirtz v. Jones,* 340 F. 2d 901, 904 (5th Cir. 1965). The injunction merely directs what the employer is required to do by law. It places no additional burden on the Company, but it relieves the heavy burden placed upon the Department of Labor to conduct a widespread investigation of defendant's operation. See *Wirtz v. Harper Buffing Co.,* 280 F. Supp. 376, 382 (D. Conn. 1968), aff'd. without opinion, 2d Cir. September 17, 1968, Dkt. No. 32167; *Walling v. Brooklyn Braid Co.,* 152 F. 2d 938 (2d Cir. 1945); and *Hodgson v. Ricky Fashion, Inc.,* 434 F. 2d 1261 (5th Cir. 1970).

In addition, to carry out the purpose of the Act, the injunction issued must be company-wide. Since the discriminatory practice was allowed to continue at the Corning plant, the court believes that, in other plants not under the pressure of investigation or litigation, the Company would not strenuously endeavor to correct similar discriminatory practices. *Wirtz v. Beneficial Finance Co. of Wisconsin,* 346 F. 2d 340 (7th Cir. 1965). The court directs that the defendant Company at Corning and at all branch plants, except the branch plant at Wellsboro, Pennsylvania where an action has been filed and a trial is likely in the near future, its officers, employees, and those in active concert with them are enjoined from future violations of the Act.

Interest shall be paid on the amounts withheld at the rate of 6% from the median date of employment. In *Hodgson v. American Can Co.-Dixie Products,* 440 F. 2d 916, 922 (8th Cir. 1971), the court explained the reason for the award of interest:

> ". . . In the absence of an unequivocal prohibition of interest, and where the statute imposes a money

obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties. Rodgers v. United States, 332 U. S. 371, 68 S. Ct. 5, 92 L. Ed. 3 (1947). Clearly the award of back wages under the Fair Labor Standards Act is remedial in nature. 29 U. S. C. § 202(b). . . . The purpose of the award is to compensate the employees for the loss sustained because of the wrongful withholding of wages. While the good faith of the employer is one of many factors to be considered, '[t]o make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable.' . . .

From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use. The interest should be allowed from the dates of the underpayment. . . ."

Similar considerations require the awarding of interest in this case.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: August 3, 1971.

JUDGMENT OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 1967-29.

This cause having come on to be tried in this Court and the testimony, exhibits and evidence adduced by the parties having been considered, and the cause having been argued by counsel, and the Court, after due deliberation having filed on July 10, 1970, an order dated July 10, 1970, and having filed on August 3, 1971, a decision and order dated August 3, 1971, which orders and decision constituted the Court's findings of fact and conclusion of law, it is now; therefore, upon motion of the attorneys for the Plaintiff and for cause shown:

ORDERED, ADJUDGED AND DECREED that Defendant, Corning Glass Works, at Corning, New York, and at all branch plants, except the branch plant at Wellsboro, Pennsylvania, its officers, agents, servants, employees and

those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and they hereby are, permanently enjoined and restrained from violating the provisions of sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201-219), hereinafter called the Act, in any of the following manners:

(1) The defendant shall not, contrary to section 6(d)(1) of the Act, discriminate on the basis of sex between employees employed within an establishment by paying wages to employees in such establishment at a rate less than the rate at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions:

(2) The defendant shall not, contrary to section 6(d)(1) of the Act, reduce the wage rate of any employee in order to comply with the provisions of section 6(d)(1) of the Act:

(3) The defendant shall not, contrary to section 15(a)(1) of the Act, transports, offer for transportation, ship, deliver, or sell in commerce, as defined by the Act, or ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any of its employees has hereafter been employed in violation of section 6(d)(1) of the Act:

(4) Defendants shall cease to withhold any amounts owing to any employee which have been withheld in violation of section 6(d)(1) of the Act:

IT IS FURTHER ORDERED that:

(a) Defendant shall increase the base hourly wage rates of employees hired prior to January 20, 1969, working in A Factory, B Factory and Pressware Plant, on the jobs of Inspector Class C and Inspector Class B on other than the steady night shift to the same base hourly wage rate including the so-called red circle differential paid to employees of like seniority for the performance of those jobs on the steady night shift; and

(b) Exhibit marked "A", consisting of one computer printout volume of 132 pages, comprises computations submitted by defendant for period from November 1, 1964, through June 27, 1971, showing gross amount of $536,581.08 due to 946 employees ($526,825.09 back wages to 677 female employees, $9,755.99 back wages to 269 male employees), be and the same hereby is made a part of this judgment; and

(c) Defendant shall determine from defendant's records the amount owing employees from June 28, 1971, to the date that the base hourly wage rates of the jobs are increased in accordance with part (a) above, such supplemental calculation to be performed on the same basis and in the same manner as the calculation of back wages set forth in (b) above, with interest at six per centum per annum to the date that the base hourly wage rates of the jobs are increased as set forth herein. Such further determination of amounts owing shall be approved by counsel for the plaintiff and be subject to the supervision of the court and shall be incorporated in this judgment by appropriate supplemental order; and

(d) The net amounts owing as set forth in this judgment shall be paid no later than ninety days after the filing of this judgment, subject to such stay of payment pending the resolution of an appeal as may be agreed upon or granted, and any net sums which within one year after the filing of this judgment have not been distributed to employees or to their personal representatives because of inability of either defendant or plaintiff to locate the proper persons, or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U. S. C. 2041 (1964); and

(e) Taxing of costs against defendant.

Dated: This 30th day of November, 1971.

JOHN T. CURTIN,
United States District Judge.

OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 252, 349—September Term, 1972.

Argued January 4, 1973. Decided February 2, 1973.

Docket Nos. 72-1229, 72-1230.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Appellee,

v.

CORNING GLASS WORKS, a Corporation,

Appellant.

Before FRIENDLY, *Chief Judge,* KAUFMAN, *Circuit Judge,* and HOLDEN,* *District Judge.*

Appeal from a judgment of the District Court for the Western District of New York, John T. Curtin, *Judge,* 319 F. Supp. 1161, 330 F. Supp. 46, in an action by the Secretary of Labor under the equal pay provisions of the Fair Labor Standards Act, awarding back pay and enjoining future violations. Modified and affirmed.

---

* Chief Judge of the District Court for the District of Vermont, sitting by designation.

Carin Ann Clauss, Esq., Associate Solicitor (Richard F. Schubert, Esq., Solicitor, of Labor, Francis V. LaRuffa, Esq., Regional Solicitor, Donald S. Shire, Esq., Helen W. Judd, Esq., Isabelle R. Cappello, Esq., and Sylvia S. Ellison, Esq., Attorneys, of Counsel), for Appellee.

Scott F. Zimmerman, Esq., Pittsburgh, Pennsylvania (Reed, Smith, Shaw & McClay, John G. Wayman, Esq., and Walter P. DeForest, Esq., Pittsburgh, Pennsylvania, of Counsel), for Appellant.

FRIENDLY, *Chief Judge:*

This appeal marks this Court's first encounter with the Equal Pay Act of 1963, 29 U. S. C. § 206(d), one of the many beneficent remedial statutes enacted during the last decade which create new tasks for the federal courts. The burden is increased, perhaps needlessly, because, as is the case with other provisions of the Fair Labor Standards Act of which it forms a part, the Equal Pay Act has no provision for administrative fact-finding.

The controlling statute, 29 U. S. C. § 206(d)(1), of seeming simplicity, reads as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed

under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

I.

Since the parties broadly accept the factual findings of the district court, a brief summary will suffice.

The controversy concerns the wages paid by Corning Glass Works ("Corning") to Class B, Class C, and General TV inspectors,[1] in its A Factory, B & C Factory, and Pressware Plant at Corning, New York. Prior to 1925, Corning operated its plants only during the day, and found it unnecessary or undesirable to have a night shift. Between 1925 and 1930, however, the introduction of automatic production equipment made it necessary to institute a night inspection shift. Although, as the district judge found, *Shultz v. Corning Glass Works*, 319 F. Supp. 1161, 1170 (W. D. N. Y. 1970), previously "women had filled most, if not all, of the inspection jobs on the day and afternoon

[1] Although the Secretary of Labor previously claimed that the wages paid to a fourth class of employees, TV Inspectors, also violated the Equal Pay Act, the district court seemingly held that the Secretary had not met his burden of proof that the work done by men and women on these jobs was equal and did not include these jobs in its back pay award. See *Shultz v. Corning Glass Works*, 319 F. Supp. 1161, 1168, 1171 (W.D.N.Y. 1970). The Secretary has not appealed this aspect of the district court's order.

shifts," New York law[2] then prohibited the employment of women between 10:00 P. M. and 6:00 A. M., and thus Corning had to recruit male employees for a steady night shift. They demanded and received wages comparable to what they were earning on other, often more demanding jobs in the plant, which were approximately twice those paid to the female inspectors. The base rate for the inspectors on the night shift was 53 cents per hour, as against 24 to 28 cents per hour for the female inspectors on the day shifts.

Thus a situation was created where the night inspection shift was all male, the day shift virtually all female, and the males received wages significantly higher than the females. This state of affairs persisted until the effective date of the Equal Pay Act—and beyond it—except for one brief period when, because of labor shortages during World War II, New York allowed women to work at night; women employed by Corning on the night shift during that period received the same wages as the men when they performed the same work. In 1944 the Corning, New York plants were organized by the American Flint Glass Workers Union and a collective bargaining agreement was negotiated which provided for the company's first plant-wide night shift differential.[3] But this change in Corning's wage structure did not eliminate the higher base wage paid to male night

[2] 1927 N.Y. Laws, ch. 453; 1930 N.Y. Laws, ch. 868.

[3] The record does not reveal whether, apart from the inspectors, Corning had paid more for night work before the institution of the plant-wide differential in the 1944 agreement. Corning suggested that there might have been other jobs performed by women during the day for which the company had to pay a higher wage to get men to perform at night. It seems relatively clear, however, that if a job had been performed on the day shift by men, men on the night shift would receive the same wage.

inspectors since, in the case of the inspectors, the shift differential was superimposed upon the existing difference in wage scales. Similarly, although in 1953 New York changed its law to permit females over the age of 21 to work after midnight in factories operating multiple shifts where the Industrial Commissioner found transportation and safety conditions to be satisfactory and granted approval,[4] the record does not reveal any application by Corning for such approval prior to 1966.

The Equal Pay Act became effective with respect to Corning's Corning, New York plants on June 11, 1964.[5] Since Corning had previously maintained separate "male" and "female" rate schedules plant-wide, with the latter materially lower, the Act clearly called for action on its part. Corning therefore merged the separate schedules into one. However, so far as concerned the inspectors, this was a matter of theory only, since the day shift inspectors were assigned to lower wage groups, see 319 F. Supp. at 1165-66. Thus, as the district court found, 319 F. Supp. at 1166, "the merger continued the historical difference in base hourly rates of the men and women inspectors working the three shifts."

Corning's first significant step toward eliminating the differential wage rates for male and female inspectors took place on June 1, 1966, when it opened the inspection jobs on the night shift to women, presumably with the approval of the State Industrial Commissioner. At this time Corning

[4] 1953 N.Y. Laws, ch. 708, *amending* N.Y. Labor Law § 172, *now* N.Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

[5] It was stipulated that the statute of limitations barred all claims arising prior to November 1, 1964 and that any back pay awards in this action should run only from that date.

consolidated its theretofore separate male and female seniority lists, and women became eligible to bid for the higher paid night inspection jobs when vacancies occurred. It is undisputed that a considerable number of women took advantage of this opportunity; turnover in the night inspection jobs was substantial and over half the vacancies were taken by women. Still, the process required some time since women could not exercise their seniority to "bump" a less senior male night inspector.[6]

The last significant event was Corning's negotiation of a new collective bargaining agreement with the Flint Glass Workers Union, effective January 20, 1969. This abolished the separate base wage rates of day and night shift inspectors and increased the rate for all inspectors, so that the resulting base wage was the same for all three shifts and exceeded the wage rates on the steady night shift previously in effect. If the agreement had stopped at that point, there could be no substantial claim of further violation of the Equal Pay Act. However, the agreement provided for a higher "red circle" basic rate to every person employed before January 20, 1969, when working as an inspector on the night shift. At the time of the last hearing in the district court, over two years after the new agreement went into effect, all the night inspectors were being paid at the "red circle" rate; unless Corning changes its system, this is likely to continue for some time since at the date of the hearing over 500 laid-off inspectors had to be offered reemployment before any new inspectors could be hired.

---

[6] In 1966 only 4 of 15 women requesting transfer to the night shift received this. The situation later improved so that 39 out of 61 requests were honored in 1967, and 42 out of 52 through November 7 in 1968

The district court held that Corning had been in continuing violation of the Equal Pay Act; directed it to pay the night rate to all inspectors from November 1, 1964, see note 5 *supra*, to January 20, 1969, and the "red circle" rate thereafter to all inspectors until true equalization was effected; awarded interest at the rate of 6% per annum on the amounts withheld; and issued an injunction against future violations of the Act of any kind with respect to all categories of employees at all plants except the branch plant at Wellsboro, Pennsylvania.[7] Corning claims that it was never in violation of the Equal Pay Act; that if it was, any violation ended on June 1, 1966, when women became eligible to work on the night shift, or, at latest, on January 20, 1969, when the differences in basic wage rates were abolished; and that the broad injunction was unjustified. Although the issues are not free from doubt, we reject all contentions save the last.

II.

The parties are in agreement on the general approach we should follow. The initial question is whether the inspection jobs on the day and night shifts constituted "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The Secretary has the burden on this, *Shultz v. American Can Co.*, 424 F.2d 356, 360 (8 Cir. 1970); *Hodgson v. Brookhaven Gen'l Hosp.*, 436 F.2d 719, 722

[7] The reason for the exception was that an action with respect to the Wellsboro plant, on facts similar to those in the instant case, was then pending in the District Court for the Middle District of Pennsylvania. This has since been decided in favor of Corning, *Hodgson v. Corning Glass Works*, 341 F. Supp. 18 (1972), and is now on appeal to the Third Circuit

(5 Cir. 1970), and, if he has not sustained it, the complaint must be dismissed even if the wage differentials were unreasonably large in comparison with the actual differences in skill, effort, responsibility, or working conditions, and were based on discriminatory motivation; Congress did not intend to put either the Secretary or the courts in the business of evaluating jobs and determining what constituted a proper differential for unequal work. See 109 Cong. Rec. 9197-98, 9209 (1963); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7 Cir. 1972). The Secretary also has the burden of establishing a prima facie case that the wage differentials represent "discriminat[ion] . . . on the basis of sex." *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3 Cir.), *cert. denied*, 398 U. S. 905 (1970). Once the Secretary has sustained these burdens, the employer can escape liability only by bringing itself within one of the four exceptions, the one that is particularly relevant here being the general escape clause, "a differential based on any other factor other than sex." On this the employer has the burden. *Shultz v. Wheaton Glass Co., supra*, 421 F.2d at 266; *Shultz v. American Can Co., supra*, 424 F.2d at 362.

Corning's most basic contention—one which, if sustained, would immediately end the case—is that work on a steady night shift is not performed under "working conditions" similar to work on day or afternoon shifts. To those uninitiated in the language of industrial relations, that would indeed seem to be true, and the District Court for the Middle District of Pennsylvania has so held, see note 7 *supra*. But, as said in one of Mr. Justice Frankfurter's early opinions, "[t]he recognized practices of an industry give life to the dead words of a statute dealing with it." *United States v. Maher*, 307 U. S. 148, 155 (1939). Statutory language ad-

dressed to experts must be read in the way the experts would understand it. See *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 326-27 (1951) (Frankfurter, J., dissenting).

The legislative history of the Equal Pay Act supports the construction that the time at which work is performed was not regarded as a "working condition" but rather as a proper subject for "a differential based on any other factor other than sex." The equal pay bills, H.R. 3861, 88th Cong., 1st Sess. (1963); S.910, 88th Cong., 1st Sess. (1963), as originally introduced in Congress, would have required equal pay for "equal work on jobs the performance of which requires equal skills." Ezra G. Hester, then Corning's Director of Industrial Relations Research, testified before both House and Senate Committees in opposition to this formulation. He pointed out that most of industry was by then using formal job evaluation systems in order to establish equitable wage structures in their plants, and that most of these job classification systems considered three factors in addition to "skill," to wit, effort, responsibility, and working conditions. As an example, he cited his own company's plan, which was introduced into the record. Under "working conditions" the plan and the accompanying job evaluation sheets listed two factors: "surroundings" (requiring evaluation of exposure to elements, intensity, and frequency) and "hazards" (requiring evaluation of frequency of exposure to hazard, frequency of injury, and seriousness of injury); nothing was said about time of day worked or differences in shift.[8] Mr. Hester

[8] Edward W. Noble, Corning's Manager of Job Evaluation, testifying in this case, gave a similar description of Corning's job evaluation plan and said specifically that the time of day was not con-

(Footnote continued on following page)

testified that "Other companies use similar job evaluation sheets," and urged the committees to amend the proposed legislation to conform to these industry practices. See *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the House Committee on Education and Labor,* 88th Cong., 1st Sess. 232-40 (1963); *Hearings on S. 882 and S. 910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 88th Cong., 1st Sess. 96-104 (1963).

In response to this, the bill was rewritten in committee and placed in its present form. Five House Committee members thus explained the change, H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963):

> The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

Earlier in the Report, at p. 3, the Committee had indicated where it thought shift differentials would fit into the statute:

> Three specific exceptions and one broad general exception are also listed. . . . As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other

---

(Footnote continued from preceding page)
sidered to be a "working condition." See also the Dictionary of Occupational Titles (3d ed. 1965), published by the Manpower Administration of the Department of Labor. Volume II: Occupational Classification, at 656, defines working conditions as "the physical surroundings of a worker in a specific job," and gives the following examples: inside work v. outside work, exposure to heat, cold, wetness, humidity, noise, vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation. It does not mention night work.

> than sex"] has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.

This persuasive explanation of how the bill took shape, and the evident understanding of the Committee, consistent with this explanation, of the structure of the amended bill, outweigh the point, strongly pressed by Corning, that Representative Goodell, who introduced the bill and had a hand in redrafting it, remarked during the course of an explanation of its provisions that "hours of work, difference in shift . . . would logically fall within the working condition factor." 109 Cong. Rec. 9209 (1963). Corning also relies upon a statement by Representative Thompson, chairman of the Subcommittee:

> Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be exempted under this act. .

109 Cong. Rec. 9196. But this does not assist Corning; indeed, since it is apparent that Representative Thompson was only paraphrasing his Committee's Report, this rather supports the construction that time of day differentials were covered under the catch-all exception rather than by the term "working conditions."

Administrative interpretation by the Wage and Hour Administrator, which the Supreme Court has held entitled to deference, *Skidmore v. Swift & Co.*, 323 U. S. 134, 140

(1944), further indicates that shift differentials are to be considered a legitimate exception to the Act rather than to reflect a difference in working conditions which would make the statute inapplicable. 29 C. F. R. §§ 800.100 *et seq.* set out the Administrator's interpretations of each of the provisions of the Equal Pay Act and each of the terms used in the Act. Under "similar working conditions," § 800.132 says that "[g]enerally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions," which in itself would seem to indicate that shift differences are not considered different working conditions since this is such a common situation. The only examples given of different working conditions are the salesman who works in a store as compared with the salesman who sells door to door, or one who does repair work in a shop as compared with one who does repair work in customers' homes. In contrast, the Administrator recognizes the legitimacy of night shift differentials in § 800.145, under "Exceptions to Equal Pay Standard."

Finally, while the case law is not conclusive, the decisions, other than the recent one between the same parties in the Middle District of Pennsylvania, see note 7 *supra*, are more favorable to the Secretary's position on this issue than to Corning's. See *Shultz v. American Can Co., supra*, 424 F. 2d 356; *Hodgson v. Miller Brewing Co., supra*, 457 F. 2d at 224-25 & n. 8; *Wirtz v. Basic Inc.*, 256 F. Supp. 786 (D. Nev. 1966).

Corning's impressive evidence that night work not only is less attractive than day work but often causes physical and emotional problems thus does not carry the day. While

the statute indeed permits all this to be taken into account, it is relevant under the catch-all exception, with its requirement that the employer establish that the differential was based on a factor other than sex, rather than making night work a different "working condition" and eliminating application of the statute altogether. Thus the question is whether the higher rate paid by Corning for night inspection work, until 1966 performed solely by males, was in fact intended as compensation for night work or constituted an added payment based in part upon sex.

A number of facts support the district court's conclusion that the latter was the situation here. As the history set out above indicates, the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks. The wage differential has never been regarded as compensation for night work. There was no evidence that any other night employees received higher pay than corresponding day workers until the plant-wide night differential was superimposed on the basic rates in 1944;[9] since that time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work. Indeed, Corning had separate male and female salary schedules until June 11, 1964.

The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men

[9] The first night shift differential was only five cents per hour; the excess in the base rates paid the men working as inspectors on the night shift over that paid the women on the day shift was at that time on the order of fourteen cents per hour.

called "female work." This is the very condition at which the Equal Pay Act was aimed. A higher rate paid to men for performing low paid "female work" is not transformed into a permissible "differential based on any other factor other than sex" simply because the men work at night. We might, of course, have a different problem if New York had continued to prohibit the employment of women at night, but the prohibition had ended a decade before enactment of the Equal Pay Act, and there is nothing to indicate that Corning would have had any more difficulty in obtaining the Industrial Commissioner's approval in 1964 than it did in 1966.

The only other basis advanced by Corning to challenge the district court's finding that it initially violated the Act is its contention that the day and night shift inspection jobs were not "equal work . . . the performance of which requires equal skill, effort, and responsibility" because some of the men on the night shift had to do their own "utility work," involving a certain amount of packing and lifting the inspected articles and cleaning up around the inspection station, which, on the day shifts, was primarily performed by male helpers especially hired for such work. It is now well settled, however, that the jobs under analysis need not be identical in every respect before the Equal Pay Act is applicable; inconsequential differences can be disregarded as long as the jobs are "substantially equal." *Shultz v. Wheaton Glass Co., supra,* 421 F. 2d at 265; *Shultz v. American Can Co., supra,* 424 F. 2d at 360; *Hodgson v. Fairmont Supply Co.,* 454 F. 2d 490, 493 (4 Cir. 1972). Applying this standard, the district court rejected Corning's contention primarily on the ground that Corn-

ing's job evaluation plan "considered the utility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors."[10] 319 F. Supp. at 1169. As the court below noted, *id.*, these job descriptions, prepared through observation of actual job performance in 1963 and 1964, are particularly significant here since they demonstrate Corning's own view of the content of the jobs before its perspective was changed by the filing of this litigation. Other evidence also showed the inconsequentiality of this factor. Although some male inspectors on the night shift had at times been given the assistance of utility workers, Corning has always continued to pay all night inspectors at the same wage. Indeed, Corning's Manager of Job Evaluation, Edward Noble, conceded that "there is very little difference from shift to shift" in the performance of these inspection jobs. There is ample support for the district court's conclusion that the relevant jobs entail "substantially equal" work. Cf. *Shultz v. American Can Co., supra,* 424 F. 2d at 360-61.

[10] Corning objects to the use made by the district court of the descriptions of the inspection jobs prepared for the Corning Glass Works Job Evaluation Plan (CGW Plan) and, to a lesser degree, of those contained in an earlier plan prepared for Corning by Stevenson, Jordan & Harrison (SJ&H Plan). Insofar as the objection rests on the hearsay rule, it is answered not only by the business records statute, 28 U.S.C. § 1732(a), but by the status of these plans as admissions (in the case of the SJ&H plan, an adoptive admission). Insofar as the objection rests on the point that application of the Equal Pay Act hinges on actual job content rather than the employer's evaluation, see *Hodgson v. Brookhaven Gen'l Hosp., supra,* 436 F.2d at 724, the evaluation is nonetheless evidence, and often exceedingly good evidence, of the actuality; if either party seeks to show the contrary, it is open to him to do so. The job descriptions, together with the supporting testimony of Edward Noble, were sufficient to sustain the Secretary's burden of proof on job equality.

We thus approve the district court's holding that when the Equal Pay Act took effect, Corning was violating it by paying higher base wages to the male night inspectors, and proceed to consider whether the violation has since been cured.

III.

Corning first contends that it cured its violation by opening the night shift to women in 1966 on what was clearly more than a token basis, but see note 6 *supra*. Although this argument seems persuasive at first blush, it must be rejected. Congress was quite specific how the injustice of unequal pay for equal work must be eradicated. Recognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor, see, *e.g., Hearings on H.R. 3861, supra*, at 8 (statement of Secretary of Labor Wirtz), Congress declared that wage discrimination on the basis of sex "depresses wages and living standards" of the many families dependent on the income of women. Equal Pay Act § 2, 77 Stat. 56. Consequently it provided that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women. This intention, clearly enough expressed in the proviso of 29 U. S. C. § 206(d)(1), that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee," received express emphasis from the legislators. "The only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." *Hearings on H. R. 3861, supra*, at

65 (statement of Representative Griffin); see also H. R. Rep. No. 309, *supra*, at 3 ("The lower wage rate must be increased to the level of the higher.")

In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration; in effect, Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially lower wage rate not justified by any factor other than sex. We thus join with every other court of appeals which has considered the issue in holding that merely opening the higher paid jobs to women as vacancies arise is not sufficient to comply with the requirements of the Equal Pay Act. *Shultz v. American Can Co.*, *supra*, 424 F. 2d at 359; *Hodgson v. Square D Co.*, 459 F. 2d 805, 808-09 (6 Cir. 1972), *cert. denied*, 41 U. S. L. W. 3230 (Oct. 24, 1972); see also *Hodgson v. Miller Brewing Co.*, *supra*, 457 F. 2d at 226-27.

We come finally to Corning's contention that any violation was cured by the new collective bargaining agreement which became effective January 20, 1969. As previously indicated, this would clearly have been so if Corning had simply established a uniform day and night shift rate at least as high as the previous night shift rate, either with or without a plant-wide night differential. The problem stems from the "red circle" rate whereby any employee

hired before January 20, 1969, receives a basic rate for night shift work some four to twelve cents per hour higher than for the day and afternoon shifts. Corning's contention that this is a differential based on seniority, another permitted exception, is belied by the fact that it is paid only for work on the night shift. We cannot disagree with the district judge, *Hodgson v. Corning Glass Works*, 330 F. Supp. 46, 50 (W. D. N. Y. 1971), that, on the facts of this case, "the 'red circle' rate paid to night shift inspectors perpetuates the discrimination of the 'supplemental escalating shift differential'"—the euphemism Corning has coined for the excess base wage rates paid to inspectors on the night shift.

We do not minimize the problems faced by Corning in changing policies originally resulting from New York law so that it will comply with the Equal Pay Act. It may well be that the wages originally paid the male inspectors on the steady night shift were more than the jobs were worth and were paid only because Corning could not get the men to do this work for less than they were receiving for labor requiring more skill or effort. With the benefit of hindsight, Corning could have avoided this suit—and its back pay liability—by opening the night shift to women once the New York law was changed in 1953, when there was no legal obstacle to reducing the night rate, or, perhaps more realistically in light of union pressures, holding the night rate and gradually increasing the day rate until the two met, as was finally done, save for the "red circle" provision, in 1969. Even with the passage of the Act, however, Corning had ample time to restructure its wage rates to comply with the Act's provisions, for Congress postponed its effectiveness for one year, see Equal Pay Act

§ 4, 77 Stat. 57, in order to avoid the "severe hardship" immediate compliance might impose on employers. See S. Rep. No. 176, 88th Cong., 1st Sess. 5 (1963). But it did not do so, and upon the effectiveness of the Act, many of Corning's options were foreclosed by the proviso previously discussed. If the result here seems harsh in view of the efforts Corning has been making since 1966, the harshness is that which may be inevitable when a legislature demands a drastic change in discriminatory practices that had too long been accepted.

IV.

Not content with requiring the payment of back wages which, with interest, will exceed $600,000,[11] the district court issued a sweeping injunction, broadly incorporating the words of the Act and applicable to all Corning plants (save that in Wellsboro, Pennsylvania), which we quote in the margin.[12]

---

[11] Corning also challenges the district court's calculation of the amount of back pay due. We see no merit in this contention.

[12] (1) The defendant shall not, contrary to section 6(d) (1) of the Act, discriminate on the basis of sex between employees employed within an establishment by paying wages to employees in such establishment at a rate less than the rate at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions:

(2) The defendant shall not, contrary to section 6(d) (1) of the Act, reduce the wage rate of any employee in order to comply with the provisions of section 6(d) (1) of the Act:

(3) The defendant shall not, contrary to section 15(a) (1) of the Act, transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any of its employees has hereafter been employed in violation of section 6(d) (1) of the Act:

(Footnote continued on following page)

We see no justification for this. Corning had been found to have violated the Equal Pay Act only with respect to one class of employee at its three plants in Corning, New York. As indicated, the violations were largely a result of the New York law which until 1953 had prohibited the employment of women at night. The Secretary's case was by no means impregnable, and Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring itself into compliance. There was no evidence of widespread violations of the Act, either at the Corning plants or its 26 branch plants nationwide. The evidence rather was that the only other cases where a similar violation might exist were the inspection jobs in the plant at Wellsboro, Pennsylvania, which was excepted from the injunction because of a pending suit by the Secretary, and in a plant at Central Falls, Rhode Island, as to which the Secretary had also already instituted suit. Yet so broad an injunction put Corning under threat of contempt for any alleged violation of the Equal Pay Act in respect of any category of employee in all but one of Corning's many plants.

We agree with the point made by the Eighth Circuit, in another Equal Pay Act case, *Hodgson v. American Can Co.*, 440 F. 2d 916, 921 (1972), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nationwide injunction. Moreover, the Supreme Court has held that

> the mere fact that a court has found that a defendant has committed an act in violation of a statute does not

---

(Footnote continued from preceding page)

(4) Defendants shall cease to withhold any amounts owing to any employee which have been withheld in violation of section 6(d) (1) of the Act.

> justify an injunction broadly to obey the statute and thus to subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

NLRB v. Express Publishing Co., 312 U. S. 426, 435-36 (1941). Since there is no showing here of the "proclivity for unlawful conduct" or "record of continuing and persistent violations of the Act" found to justify such an injunction in *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 192 (1949), the injunction must be narrowed accordingly. While *Hodgson v. First Fed. Savings & Loan Ass'n.*, 455 F. 2d 818, 825-27 (5 Cir. 1972), relied on by the Secretary, may have been correctly decided on its own facts, we cannot subscribe, in the light of *Express Publishing* and our own views, to all that was there said.

The injunction is modified by eliminating paragraph (3) and limiting the remaining paragraphs to inspectors at the three Corning plants. As so modified, the judgment is affirmed. No costs.

Hodgson v. Corning Glass Works, a Corporation
I concur 1/24/73
I. R. K.

Hodgson v. Corning Glass Works, a Corporation
I concur 2/2/73
JAMES S. HOLDEN

[Filed, February 2, 1973]

JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of February one thousand nine hundred and seventy-three.

Present: Hon. Henry J. Friendly, *Chief Judge.*
Hon. Irving R. Kaufman, *Circuit Judge.*
Hon. James S. Holden, *District Judge.*

JAMES D. HODGSON, Secretary of Labor, United States, Department of Labor,
Plaintiff-Appellee,

v.

CORNING GLASS WORKS, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and orders of said District Court be and they hereby are

modified and as so modified said judgment and orders be and they hereby are affirmed without costs in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk,

BY: VINCENT A. CARLIN,
Chief Deputy Clerk.

[Filed, February 2, 1973]

ORDER ALLOWING CERTIORARI.

SUPREME COURT OF THE UNITED STATES

No. 73-29

CORNING GLASS WORKS,

Petitioner,

v.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor

---

ORDER ALLOWING CERTIORARI. Filed December 17, 1973. The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 73-695 and a total of one hour is allotted for oral argument.

INDEX TO APPENDIX.

	Direct Exam.	Cross Exam.	Re-direct Exam.	Re-cross Exam.	PAGE
Chronological List of Relevant Docket Entries in the District Court					1
Chronological List of Docket Entries in the Court of Appeals					15
Complaint					22
Answer					25
Stipulations of Facts					26
Stipulations of Facts to Which Defendant Either Makes Objection or Withdraws a Prior Objection					58
Transcript of Proceedings, October 18, 1971					81
Transcript of Proceedings, October 19, 1971					83
Plaintiff's Case:					
Mr. Seamans					84
Transcript of Proceedings, October 20, 1971					85
Defendant's Case:					
Dr. Paul N. Lehoczky	86	90	97		
Transcript of Proceedings, October 21, 1971					99
Stipulations at Trial					100
Mr. McKibbin	102	104			
Opinion of the District Court					175
Supplemental Findings of Fact of the District Court					182
Judgment of the District Court					194
Opinion of the Court of Appeals					195
Judgment of the Court of Appeals					209
Order Allowing Certiorari					210

II.

Exhibits.

PAGE

Plaintiff's Exhibits:

Exhibit 1—Defendant's Answers to Plaintiff's Interrogatories, First Set. 105

Exhibit B1 to Plaintiff's Exhibit 1 [Responsive to Interrogatory No. 4]—Male Schedule Deriving Rate Ranges and Steps, Cancels Sheet Effective 11/19/62, Effective January 20, 1964 116

Exhibit B3 to Plaintiff's Exhibit 1 [Responsive to Interrogatory No. 4]—Wellsboro Jobs 117

Exhibit C1 to Plaintiff's Exhibit 1 [Responsive to Interrogatory No. 5]—Female Schedule for Deriving Rate Ranges and Steps, Cancels Sheet Effective 11/19/62, Effective January 20, 1964 118

Exhibit C3 to Plaintiff's Exhibit 1 [Responsive to Interrogatory No. 5]—Job Titles and Job Code Numbers 119

Exhibit 4—Defendants' Answers to Plaintiff's Second Request for Admissions and Fourth Set of Interrogatories 120

Exhibit N to Plaintiff's Exhibit 4 [Responsive to Interrogatory No. 103]—Information requested with respect to all females who transferred from the job of Inspector—Packer on the steady night shift to the job of Inspector—Packer on the rotating day and afternoon shifts from October 17, 1966, through December 28, 1969 121

Exhibit 5—Deposition of Perry Seamans [March 30, 1971] 122

Exhibit 6—Deposition of Seth J. McKibbin [July 14, 1971] 131

III.

PAGE

Exhibit T-1 to Plaintiff's Exhibit 6—Wellsboro Plant—Rate Schedule 152
Exhibit T-2 to Plaintiff's Exhibit 6—Hourly Rate Procedure 153
Exhibit T-3 to Plaintiff's Exhibit 6—Hourly Rate Structure 154
Exhibit T-4 to Plaintiff's Exhibit 6—Hourly Rate Structure 155
Exhibit T-5 to Plaintiff's Exhibit 6—Hourly Rate Structure 156
Exhibit T-6 to Plaintiff's Exhibit 6—Hourly Rate Structure 157
Exhibit T-7 to Plaintiff's Exhibit 6—Wellsboro Conversion Schedule 158
Exhibit T-8 to Plaintiff's Exhibit 6—S J & H Plan Rate Step Table 159
Exhibit T-9 to Plaintiff's Exhibit 6—CGW Plan Rate Step Table 160
Exhibit T-10 to Plaintiff's Exhibit 6—Schedule for Deriving Rate Ranges and Steps—Wellsboro 161
Exhibit T-11 to Plaintiff's Exhibit 6—Schedule for Deriving Rate Ranges and Steps—Wellsboro 162
Exhibit T-12 to Plaintiff's Exhibit 6—Wellsboro Conversion Schedule 163
Exhibit T-13 to Plaintiff's Exhibit 6—Schedule for Deriving Rate Ranges and Steps—Wellsboro 164
Exhibit T-14 to Plaintiff's Exhibit 6—Wellsboro Conversion Schedule 165
Exhibit T-15 to Plaintiff's Exhibit 6—Schedule for Deriving Rate Ranges and Steps—Wellsboro 166
Exhibit T-16 to Plaintiff's Exhibit 6—Conversion Schedule—Wellsboro 167

PAGE

Exhibit T-17 to Plaintiff's Exhibit 6—Hourly Group Number Conversion Table—Wellsboro 168
Exhibit T-18 to Plaintiff's Exhibit 6—Schedule for Deriving Rate Ranges and Steps—Wellsboro 169
Exhibit T-19 to Plaintiff's Exhibit 6—Conversion Schedule 170
Exhibit T-20 to Plaintiff's Exhibit 6—Male Schedule for Deriving Rate Ranges and Steps 171
Exhibit T-21 to Plaintiff's Exhibit 6—Female Schedule for Deriving Rate Ranges and Steps ... 172
Exhibit T-60 to Plaintiff's Exhibit 6—Male Schedule for Deriving Rate Ranges and Steps 173
Exhibit T-61 to Plaintiff's Exhibit 6—Female Schedule for Deriving Rate Ranges and Steps .. 174

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 69-396.

Date *Docket Entries*

1969

Oct. 2 1- COMPLAINT

Oct. 2 2- SUMMONS — issued and together with copy of Complaint handed to U. S. Marshal for service.

Oct. 2 J.S. 5

Oct. 17 SUMMONS — returned served 10/16/69, together with copy of Complaint. (MF&E $24.36)

Oct. 21 3- PRAECIPE — to enter the appearance of Robert F. Cox, Esquire and of John G. Wayman, Esquire, as attorneys for Corning Glass Works, Defendant, and

LETTER — as certificate of service attached thereto.

Docket Entries in the District Court.

Date

1969

Nov. 6 4- ANSWER — of Defendant Corning Glass Works to Complaint, and

Nov. 6 5- CERTIFICATE — of service thereof.

Nov. 6 6- INTERROGATORIES — of Defendant, Set No. 1.

Nov. 6 7- CERTIFICATE — of service thereof.

Nov. 20 8- MOTION AND ORDER — extending time within which plaintiff may answer interrogatories to 12-22-69. (N)

Dec. 18 9- ANSWERS — of plaintiff to defendant's interrogatories. Set No. 1., and

Dec. 18 CERTIFICATE — of service thereof.

Dec. 18 10- INTERROGATORIES — propounded plaintiff to defendant, and

Dec. 18 CERTIFICATE — of service thereof.

1970

Jan. 13 11- MOTION AND ORDER — extending time for defendant to answer interrogatories, and

Jan. 13 CERTIFICATE — of service thereof. (N)

Mar. 16 12- STIPULATION & ORDER — that the Defendant may have until April 15, 1970 within which to answer or otherwise plead to Plaintiff's Interrogatories to Defendant, First Set.

Docket Entries in the District Court.

Date

1970

Apr. 17 13- ANSWERS — of defendant to plaintiff's interrogatories, first set. (In addition to the answers and the exhibits, up to the letter H under one backer, there are other large book type exhibits I, J, K-1 and K-2 which are separate but are in conjunction with the answers)

May 12 14- INTERROGATORIES — of plaintiff to defendant, Second Set, and

May 12 CERTIFICATE — of service thereof.

June 8 15- ANSWERS — of defendant to interrogatories, second and

June 8 STATEMENT — of service thereof.

Nov. 20 16- PRE-TRIAL ORDER — of Judge Muir.

Dec. 21 17- MINUTE SHEET — of Clerk *re* pre-trial conference. General discussion. Motion to produce to be filed by government by Jan. 15, 1971. Counsel to be given, if possible, 30 days notice of final pre-trial conference. Pre-trial status conference set for Monday, March 29, 1971, at 1:30 P. M. at Williamsport.

Dec. 22 18- ORDER — of Court; Jurisdiction is conferred on this Court by 29 U.S.C. 201-219.

Plaintiff shall file a Motion to Produce by Jan. 15, 1971.

Docket Entries in the District Court.

Date

1970

A second, but not final, pre-trial conference shall be held in this matter on Monday, March 29, 1971 at 1:30 P.M. in Williamsport.

Thirty days notice of the final pre-trial conference shall be given to counsel for both parties in this matter. (Muir)

Dec. 22 Copies mailed to counsel of record.

Dec. 24 19- MOTION — for order to substitute party plaintiff, and

Dec. 24 ORDER — of Court, substituting James D. Hodgson, Secretary of Labor, as party plaintiff.

Dec. 28 20- REQUEST — of plaintiff to produce and permit inspection and copying of documents.

1971

Jan. 20 21- MOTION — of Defendant to bring in additional defendants.

March 8 22- NOTICE — of taking depositions, and REQUEST — of plaintiff to produce and permit inspection and copying, and

CERTIFICATE — of service thereof.

March 8 23- LETTER — of Clerk to counsel of record, that the pre-trial conference set for Monday, March 29, 1971, at 1:30 P. M. is continued to Thursday, April 8, 1971 at 1:30 P. M. at Williamsport.

Date

1971

At that time, the Court will also hear argument on Motion of Defendant to bring in additional defendants. Defendant's Brief shall be due 10 days before argument and plaintiff's brief shall be due 3 days before argument.

Mar. 29 24- BRIEF — of defendant in support of its motion to bring in additional defendants.

Apr. 6 25- MEMORANDUM — of plaintiff in opposition to defendant's motion to bring in additional defendants.

Apr. 8 26- MINUTE SHEET — of Clerk *re* argument on motion of defendant to being additional defendants; also status report on case. Mr. Zimmerman argues Motion to Court. Mrs. Cappello argues Motion on behalf of Dept. of Labor.

Motion under advisement.

Mr. Zimmerman to file additional Motion to Suppress Evidence within two weeks. Defendant's brief on motion due May 5, 1971. Government brief on Motion due May 15, 1971. Motion to be decided on briefs.

Status Report Conference Date: Tuesday, June 1, 1971, 1:30 P.M. at Williamsport, Pa.

Apr. 13 27- ORDER — of Court, that the motion of defendant to bring additional defendants is denied. (Muir)

Docket Entries in the District Court.

Date

1971

Apr. 13 Copies to all counsel, mailed from Williamsport

Apr. 27 28- ORDER — of Court; paragraph 4.5 of the pre-trial Order dated Nov. 20, 1970, is hereby deleted. (Muir)

Apr. 27 Copy to counsel of record, from Williamsport Office.

May 21 29- PLAINTIFF'S OPPOSITION — to defendant's Motion for Protective Order

June 1 30- MINUTE SHEET — of Clerk, *re* status report and argument on motion for a protective order. Motion argued and taken under advisement. Final pre-trial 10-5-71 at 2:00 P.M. at Lewisburg, Pa. Non-jury trial Oct. 18, 1971 at 10:00 A.M. at Lewisburg, Pa. 3 day trial. (M)

May 7 31- DEFENDANT'S MOTION — for protective order.

June 3 32- ORDER — denying motion for protective order. (M) Copies mailed counsel of record.

June 3 33- FINAL PRE-TRIAL ORDER — Same information as contained in Document 30 above. (M)

June 3 Copies of order mailed counsel of record

June 7 34- LETTER — from Williamsport Office to All Counsel of Record and receipt thereon acknowledging Order dated June 3, 1971.

Docket Entries in the District Court.

Date

1971

June 11 35- NOTICE — of taking depositions, and

June 11 REQUEST — to produce and permit inspection and Copying, and

June 11 CERTIFICATE — of service thereof.

June 14 36- PLAINTIFF'S REQUESTS — for admissions and third set of interrogatories.

Aug. 3 37- DEFENDANT'S ANSWERS — to plaintiff's requests for admissions and third set of interrogatories.

Aug. 10 38- PLAINTIFF'S REQUESTS — to produce documents for inspection and copying.

Aug. 10 39- PLAINTIFF'S — second request for admissions and fourth set of interrogatories.

Sept. 20 40- NOTICE — of taking depositions and request to produce and permit inspection and copying and

Sept. 20 CERTIFICATE — of service thereof.

Sept. 23 41- NOTICE — of Plaintiff to take depositions and

CERTIFICATE — of service thereof.

Sept. 24 42- ANSWERS — of defendant to plaintiff's second request for admissions and fourth set interrogatories. (Exhibit M-1 to Interrogatory 100, and Exhibit I-A to Interrogatory 101) and

Sept. 24 CERTIFICATE — of service thereof.

Docket Entries in the District Court.

Date

1971

Oct. 5 43- DEPOSITIONS — of Perry Seamans, Leo Shoger and Richard Marks.

Oct. 4 44- DEPOSITION — of Seth McKibben.

Oct. 5 45- 5.1 STIPULATION — of facts, filed by plaintiff.

Oct. 5 46- 5.2 EXPERT WITNESSES QUALIFICATIONS — filed by plaintiff.

Oct. 5 47- SCHEDULE — of plaintiff's exhibits.

Oct. 5 48- LIST — of prospective witnesses who may be called by plaintiff.

Oct. 5 49- CONTESTED ISSUES OF FACT — filed by plaintiff.

Oct. 5 50- CONTESTED ISSUES OF LAW — filed by plaintiff.

Oct. 5 51- AGREED STATEMENT — of contested issues of law.

Oct. 5 52- STATEMENT — of special damages.

Oct. 5 53- LIST — of depositions plaintiffs will offer in evidence.

Oct. 5 54- REQUEST — of plaintiffs for findings.

Oct. 5 55- REQUEST — of plaintiffs for conclusions of law.

Oct. 5 56- TRIAL BRIEF — of plaintiffs.

Docket Entries in the District Court.

Date

1971

Oct. 5 57- OBJECTIONS — by defendant to certain stipulations of fact.

Oct. 5 58- STIPULATION — of facts not contested but subject to rebuttal.

Oct. 5 59- LIST OF EXHIBITS

Oct. 5 60- LIST — of potential witnesses — defense.

Oct. 5 61- STIPULATION — of facts which are contested.

Oct. 5 62- STIPULATION — of contested issues of law.

Oct. 5 63- OBJECTIONS — of defendant to admissions into evidence of plaintiffs' interrogatories, requests for admissions and answers thereto.

Oct. 5 64- FINDINGS OF FACT — and Conclusions of Law of Corning Glass Works.

Oct. 5 65- PRE-TRIAL MEMORANDUM — of defendants.

Oct. 5 66- DECISION AND ORDER — *re* Corning Glass Works, filed Aug. 3, 1971, in the Western Dist. of N. Y.

Oct. 5 67- BRIEF — of Corning Glass Works in the Western Dist. of N.Y.

Oct. 5 68- OPINION (COPY) — in the U. S. Court of Appeals for the Fifth Circuit *re* Hodgson v. American Bank of Commerce.

Docket Entries in the District Court.

Date

1971

Oct. 13 69- BRIEF — of Corning Glass Works in support of both general and specific objections by defendant to certain proposed stipulations of fact and to admissions into evidence of plaintiff's interrogatories, requests for admissions, depositions, and the answers thereto.

Oct. 14 70- EXHIBITS — of plaintiffs to depositions — (A to S as to Seamans, Shoger and Marks)— T as to McKibbon.

Oct. 15 71- MOTION — of Defendant to quash subpoena for production of documents.

Oct. 18 72- MINUTE SHEET — of Clerk, *re* first day of non-jury trial. (M)

Oct. 19 73- MINUTE SHEET — of Clerk, *re* second day of non-jury trial. (M)

Oct. 20 74- MINUTE SHEET — of Clerk, *re* third day of non-jury trial. (M)

Oct. 14 75- QUALIFICATIONS — of Defendant's potential expert witnesses.

Oct. 14 76- PRE-TRIAL MEMO — of legal authority on behalf of defendant.

Oct. 14 77- STIPULATION — of Defendant of facts not contested but subject to rebuttal.

Oct. 15 78- MOTION — of Defendant to quash subpoena for production of documents.

Docket Entries in the District Court.

Date

1971

Oct. 18 79- REVISED REQUESTED CONCLUSIONS — of Law of Plaintiff and

CERTIFICATE — of service thereof.

Oct. 18 80- STATEMENT — of Plaintiff of evidenciary questions which may arise.

Oct. 18 81- RESPONSES — of Plaintiff to defendant's objections to admission into evidence of plaintiff's interrogatories, requests for admissions, deposition and the answers thereto.

Oct. 18 82- REVISED SCHEDULE — of Plaintiff's exhibits.

Oct. 19 83- WAIVER — of signature of defendant, in accordance with F.R.C.P. Rule 30(e).

Oct. 21 84- EXHIBIT LIST — of Plaintiff.

Oct. 21 85- MINUTE SHEET 4th day — of Clerk *re* non-jury trial. Closing argument.
Under Advisement. (M)

Oct. 21 86- EXHIBIT LIST — of Clerk.

Oct. 14 87- BRIEF — of Defendant in support of both general and specific objections by defendant to certain stipulations of fact and to admission into evidence of plaintiff's interrogatories, request for admission of depositions and the answers, thereto.

Nov. 17 88- TRANSCRIPT VOLUME 1 — of trial proceedings held 10-18-71.

Docket Entries in the District Court.

Date

1971

Nov. 17 89- TRANSCRIPT VOLUME 2 — of trial proceedings held 10-19-71.

Nov. 17 90- TRANSCRIPT VOLUME 4 — of trial proceedings held 10-21-71.

Nov. 22 91- TRANSCRIPT VOLUME 3 — of trial proceedings held 10-20-71.

Dec. 13 92- STIPULATIONS — of Fact to which Defendant either makes Objection or Withdrawn a Prior Objection.

Dec. 13 93- OBJECTIONS — of Defendant to Plaintiff's Exhibits.

1972

Jan. 3 94- POST-TRIAL BRIEF — of Defendant.

Jan. 3 95- REVISED REQUESTS — of Defendant for findings of fact and conclusions of law.

Jan. 3 96- POST-TRIAL PROPOSED FINDINGS OF FACT — and Conclusions of Law filed by Plaintiff.

Jan. 3 97- STIPULATION — of counsel of facts agreed to on Oct. 21, 1971

Jan. 3 98- POST-TRIAL BRIEF — of Plaintiff.

Jan. 6 99- APPENDIX TO POST-TRIAL BRIEF — of Plaintiff.

Dec. 29-1971- 100- CERTIFICATE — of service of Isabelle R. Cappello, Esq. counsel for Plaintiff. Copy

Docket Entries in the District Court.

Date

1972

of Post-trial brief and proposed findings of fact and conclusions of law was served upon defendant by mail, on Dec. 29, 1971.

Jan. 11 101- PHOTO COPIES — of War Labor Board Cases cited in Defendant's brief.

Jan. 11 102- REVISED REQUESTS — of Defendant for findings of fact and conclusions of law.

Jan. 11 103- CORRECTED POST-TRIAL BRIEF — of Defendant.

Jan. 14 104- POST-TRIAL PROPOSED FINDINGS OF FACT — and conclusions of law filed by Plaintiff.

Jan. 14 105- POST-TRIAL BRIEF — of Plaintiff.

Jan. 19 106- PLAINTIFF'S REPLY BRIEF

Jan. 19 107- DEFENDANT'S REPLY BRIEF

March 31 108- OPINION — and (M)

March 31 ORDER — Judgment is hereby entered in favor of Defendant and against Plaintiff. Plaintiff's request for an injunction enjoining alleged violations of Sections 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938, as amended, 52 stat. 1060, 29 U. S. C. Sections 201-219, and for withholding of payment of wages allegedly due Defendant's employees under the Act, is hereby denied. (M)
Copies to counsel of record from Lewisburg office.

Docket Entries in the District Court.

Date

1972

March 31 109- SUPPLEMENTAL FINDINGS — of fact.

Copies to counsel of record from Lewisburg office.

March 31 J. S. 6

May 30 110- NOTICE OF APPEAL — filed by plaintiff, and

CERTIFICATE — of service thereof. Copy to Ct. of Appeals and counsel of record.

May 30 111- PLAINTIFF'S MOTION — to extend time for transmission of Record on Appeal and Docketing Appeal., and

May 30 CERTIFICATE — of service thereof.

June 2 112- ORDER — NOW, THEREFORE, the Motion to extend the Time for Transmission of the Record and for Docketing of Appeal is denied. (M) Copies mailed to counsel of record from Lewisburg office.

June 28 RECORD ON APPEAL — mailed to U. S. Court of Appeals, together with certified copy of docket entries.

CHRONOLOGICAL LIST OF DOCKET ENTRIES IN THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

72-1590
Hodgson, Secy of Labor
(Corning Glass Works)

APPEAL FROM MIDDLE DISTRICT OF PENNSYLVANIA
(SCRANTON)

Case No. 72-1590.

CLOSED

Title of Case:

PETER BRENNAN, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

CORNING GLASS WORKS, a corporation.

---

480 F.2d 1254.

Attorneys for Appellant:

.....

Attorneys for Appellee:
Scott F. Zimmerman
Reed, Smith, Shaw & McClay

Robert F. Cox
Cox, Wilcox, Owlett & Lewis

Docket Entries in the Court of Appeals.

No. Below: S. D. C. Civil 69-396.

Judge Below: Malcolm Muir.
Date of Judgment: .....

Notice of Appeal Filed: May 30, 1972.

Commenced in D. C. 10-2-69.

Date		*Docket Entries*
1972		
July	10	Copy of Notice of Appeal, rec'd. June 26, 1972, filed. Record, rec'd. July 5, 1972, filed.
Jul.	17	Appearance of Scott F. Zimmerman, Esq.; Reed, Smith, Shaw & McClay for appellee, filed.
Jul.	20	Appearance of Robert F. Cox, Esq.; Cox, Wilcox, Owlett & Lewis for appellee, filed.
Aug.	18	Motion by appellant for extension of time until September 9, 1972 within which to file brief and appendix, filed.

Docket Entries in the Court of Appeals.

Date	
1972	
Aug. 23	Above motion granted by the Clerk and directing that no further extensions will be granted in this case and unless timely filing occurs, this case will be listed for dismissal for want of timely prosecution, filed.
Sept. 11	Brief for appellant, filed. (4 cc.—25 cc. rec'd September 18, 1972). Certificates of service by hand delivery on September 11, 1972 and by mail on September 15, 1972 appear on Page 49 of briefs.
Sept. 18	Motion by appellant for leave to file appendix out of time by October 11, 1972, filed (3 copies). Certificate of service attached.
Sept. 26	Submitted on above motion. CLERK.
Sept. 25	Motion by appellee for leave to extend time to file brief to November 2, 1972, filed. (5 copies). Certificate of service attached.
Sept. 27	Above consent motion granted. CLERK. NO FURTHER EXTENSIONS.
Oct. 2	Order (Clerk) granting appellant's motion for leave to file appendix out of time by October 11, 1972, filed.
Oct. 11	Appendix, (Vols. I and II), filed.
Oct. 11	Affidavit of service of appendix by mail on October 10, 1972, filed.

Docket Entries in the Court of Appeals.

Date	
1972	
Nov. 3	Brief for appellee, rec'd November 6, 1972, filed. (25 cc.). Proof of service by mail on November 3, 1972 appears in letter dated November 3, 1972. See Order Nov. 22—granting substituting of Brief—Appendix—filed as of 11-22-72.
Nov. 2	Motion by appellant for leave to file supplemental appendix out of time, filed. (4 copies). Certificate of service attached.
Nov. 13	Submitted on above motion by appellant for leave to file supplemental appendix out of time. CLERK.
Nov. 14	Order (*Clerk*) granting appellant's motion for leave to file supplemental appendix out of time, filed.
Nov. 14	Supplemental appendix, rec'd October 30, 1972, filed. (10 cc.). Affidavit of service by mail on October , 1972 attached to brief.
Nov. 18	Motion by appellee for permission to substitute a printed brief in excess of 50 pages to 55 pages, for brief previously filed on November 3, 1972, and for leave to file an appendix, with the cost of printing substitute brief and appendix to be borne by appellee regardless of the outcome of this appeal, in which it states that counsel for appellant has given its consent to this motion, filed. Certificate of service attached.

Docket Entries in the Court of Appeals.

Date	
1972	
Nov. 20	Consent motion by appellant for leave to file reply brief out of time by December 4, 1972, filed. (4 cc.). Certificate of service attached.
Nov. 21	Submitted on above motion by appellee. *Clerk.*
Nov. 22	Above consent motion granted. NO FURTHER EXTENSIONS. *Clerk.*
Nov. 22	Order (*Clerk*) granting appellee's motion for permission to substitute a printed brief in excess of 50 pages to 55 pages, for brief previously filed on November 3, 1972, and for leave to file an appendix, with the cost of printing substitute brief and appendix to be borne by appellee regardless of the outcome of this appeal, filed.
Nov. 22	Brief and Appendix for appellee, Corning Glass Works, rec'd. January 12, 1973, filed.
Dec. 5	Motion by appellant for leave to extend time to file reply brief to December 11, 1972, filed (4 cc.). Certificate of service in motion.
Dec. 13	Submitted on above motion. Clerk.
Dec. 15	Order (Clerk) granting appellant's motion for leave to extend time to file reply brief to December 11, 1972, NO FURTHER EXTENSIONS FOR ANY REASON, filed.

Docket Entries in the Court of Appeals.

Date	
1973	
Jan. 12	Affidavit of service of appellee's brief and appendix by mail on January 10, 1973, filed.
May 17	Letter dated May 17, 1973 enclosing copy of Second Circuit opinion in *Hodgson v. Corning Glass Works,* decided Feb. 2, 1973, 474 F. 2d 226, rec'd from Carin Ann Claus, Esquire for the information of the Court.
May 21	Argued. Coram: Kalodner, Aldisert and Adams, Circuit Judges.
May 29	Letter dated May 25, 1973 together with enclosures rec'd from Carin Ann Clauss, Esquire in response to Court's request during oral argument.
May 29	Supplemental brief for appellee, filed. (permission granted to file same at oral argument). (25 copies)
Jun. 4	Motion by appellee to Strike Appellant's letter dated May 25, 1973, rec'd (4 copies), filed. service attached.
Jun. 4	Response of appellee to appellant's letter dated May 25, 1973, rec'd (4 copies), for the information of the Court.
Jun. 28	Opinion of the Court (Kalodner, Aldisert and *Adams,* C.J.), filed.
Jun. 28	Judgment affirming, with costs taxed against appellant the judgment of the District Court filed March 31, 1972, filed.

Docket Entries in the Court of Appeals:

Date	
1973	
Jul. 11	Motion by appellant for Stay of Mandate, filed. (4 cc) service attached.
Jul. 12	Order (Adams, C.J.) staying issuance of the certified judgment in lieu of formal mandate until September 26, 1973, filed.
Sep. 20	Copy of letter dated September 18, 1973 from Clerk of S.C. to counsel for appellant advising that Justice Brennan extended the time for filing petition for writ of certiorari to October 26, 1973.
Sep. 27	Certified judgment in lieu of formal mandate issued.
Sep. 27	Record returned to Clerk of District Court.
Oct. 1	Receipt for record, filed.
Oct. 31	Notice of filing of petition for writ of certiorari on October 26, 1973 rec'd from the Clerk of the Supreme Court, filed. (S. C. No. 73-695)
Nov. 19	Certified copy of appendices and (partial) proceedings forwarded to the Clerk of the Supreme Court pursuant to the request of counsel.
Dec. 26	Certified copy of order dated December 17, 1973 granting petition for writ of certiorari rec'd from Clerk of Supreme Court; and stating that this case is consolidated in S.C. With No. 73-29 and a total of 1 hour is allotted for oral argument, filed. (S.C. No. 73-695)

COMPLAINT.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 69-396.

Plaintiff brings this action to enjoin defendant from violating the provisions of sections 15(a) (1) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201-219), hereinafter called the Act, and to restrain any withholding of payment of wages found by the court to be due to employees under the Act.

I.

Jurisdiction of this action is conferred upon this court by section 17 of the Act.

II.

Defendant, Corning Glass Works, is and at all times hereinafter mentioned was a New York corporation having an office and place of business at Jackson Street, Wellsboro, Tioga County, Commonwealth of Pennsylvania, within the jurisdiction of this court, and is and at all times hereinafter mentioned was engaged in the manufacture and distribution of a variety of glassware.

Complaint.

III.

At all times hereinafter mentioned defendant employed, and it is employing, many employees in and about its aforesaid place of business in the manufacture and distribution of various kinds of glassware. Substantial quantities of the goods produced by these employees have been and are being produced for commerce within the meaning of the Act and have been and are being transported, offered for transportation, shipped, delivered, and sold in commerce from defendant's aforesaid place of business to other States.

IV.

Defendant, an employer having employees subject to the provisions of section 6 of the Act, as aforesaid, has repeatedly and willfully violated, and it is willfully violating, the provisions of sections 6(d) and 15(a) (2) of the Act by discriminating, within its aforesaid establishment in which such employees have been and are employed, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the rates at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

V.

Defendant has repeatedly and willfully violated, and it is willfully violating, the provisions of section 15(a) (1) of the Act in that it has transported, offered for transportation, shipped, delivered, and sold in interstate commerce from its aforesaid place of business to other States, goods in the production of which employees were employed in violation of section 6 of the Act, as alleged.

VI.

Since on or about June 11, 1964, defendant has repeatedly and willfully violated, and it is willfully violating, the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is expressly authorized by section 17 of the Act;

WHEREFORE, cause having been shown, plaintiff prays judgment permanently enjoining defendant, its officers, agents, servants, employees, and those persons in active concert or participation with them, from violating the provisions of sections 15(a) (1) and 15(a) (2) of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of any withholding of payment of wages found by the court to be due to employees under the Act.

/s/ L. H. SILBERMAN
Solicitor of Labor

/s/ LOUIS WEINER
Regional Solicitor

/s/ MARSHALL H. HARRIS
Deputy Regional Solicitor

Attorneys for George P. Shultz, Secretary of Labor, United States Department of Labor, Plaintiff.

[Filed, October 2, 1969]

• • • •

ANSWER.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

Defendant, Corning Glass Works, files the following Answer to the Complaint in the above-captioned case:

1. The averments of Paragraphs I, II and III of the Complaint are admitted.

2. The averments of Paragraphs IV, V and VI of the Complaint are denied.

Affirmative Defenses

3. Corning Glass Works, Wellsboro Plant, has not in the past and does not presently discriminate in any manner against female employees. Any difference in wage rates among employees is based upon either a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex.

4. The Complaint in this action was served upon Corning Glass Works' Wellsboro Plant on October 16, 1969, therefore any matters which occurred on or before October 16, 1967, are barred by the statute of limitations. In the event that Plaintiff proves a violation of the Act and that such violation was willful, this action is barred to the extent that it depends upon events which occurred prior to October 16, 1966.

WHEREFORE, Defendant prays that the Complaint be dismissed.

Respectfully submitted,

/s/ Robert F. Cox
/s/ Cox, Wilcox, Owlett & Lewis

/s/ John G. Wayman
/s/ Scott F. Zimmerman
/s/ Reed, Smith, Shaw & McClay

Counsel for Defendant,
Corning Glass Works

[Filed, November 16, 1969]

• • • •

STIPULATIONS OF FACTS.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

(AGREED TO ON OCTOBER 21, 1971)

Counsel for the parties enter into the following stipulation of facts as required by section 5.1 of the June 3, 1971 Pretrial Order entered by the court in this case.

1. This is a suit by the Secretary of Labor under section 17 of the Fair Labor Standards Act (Act of June 25, 1938, 52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*), to enjoin defendant, its officers, agents, servants, employees,

and those persons in active concert or participation with them, from violating the equal pay provisions of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of any withholding of payment of wages found by the court to be due to employees under the Act. Jurisdiction of this action is conferred upon the court by section 17 of the Act.

2. Corning Glass Works ("Corning") is a New York corporation having its principal offices and main plant in Corning, New York, and 27 plants located in various States, one of which is located at Jackson Street, Wellsboro, Tioga County, Commonwealth of Pennsylvania, within the jurisdiction of this court.

3. Since 1916, with the exception of a shutdown period in 1925, defendant has been and is employing many employees at its Wellsboro plant in the manufacturing and distribution of various kinds of glassware. Substantial quantities of the goods produced by these employees have been and are being transported, offered for transportation, shipped, delivered and sold in commerce from the Wellsboro plant to other States.

4. The Wellsboro plant consists of one building with one main entrance.

5. The Wellsboro plant operates continuously on a three shift basis — 6 A.M. to 2 P.M. (day or second shift), 2 P.M. to 10 P.M. (afternoon or third shift), and 10 P.M. to 6 A.M. (night or first shift). Hereinafter the day and afternoon shifts will be referred to as the day shifts.

6. The jobs on which a violation of the Equal Pay Act is alleged are the jobs of Inspector-Packer, Positioner-

Inspector, Frost Light Inspector and Quality Inspector in the Wellsboro plant.

7. Women were first hired as production employees in 1917 and placed on jobs for inspecting and packing ware and making cells, a type of packing material. They worked on the day shifts.

8. Prior to October 16, 1966, except during World War II, only female employees worked the jobs of Inspector-Packer, Positioner-Inspector, Frost Light Inspector and Quality Inspector on the rotating day and afternoon shifts.

9. Prior to October 16, 1966, except during World War II, only male employees worked the jobs of Inspector-Packer, Positioner-Inspector, Frost Light Inspector and Quality Inspector on the steady night shift.

10. The steady night shift inspection jobs were created between 1925 and 1930 because of the introduction of automatic production equipment which made it necessary to inspect ware on all shifts.

11. At the time of the institution of inspection work on the night shift Corning Glass Works did not pay shift differentials.

12. When male inspectors were first assigned to the steady night shift hiring rates were determined by what an employer had to pay to fill his labor needs in the community market place. Thereafter, the rates were individual and personal, depending upon what the employer thought the employee was worth.

13. The men first assigned to inspection work on the night shift were selected from male employees within the plant and were paid the individual, personal rates they

were already receiving which were higher than the rates being paid to women doing inspection work on the day shifts.

14. The higher base hourly rate was paid only for inspection work on the steady night shift. It was never paid for inspection work on the day and afternoon shifts.

15. Until 1947, under Pennsylvania law, women were not permitted to work between the hours of 12 midnight and 6:00 a.m. (Act of July 25, 1913, P.L. 1024).

16. In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor. (Act of May 21, 1947, P.L. 389, §4). The State regulations provided, among other things, that in order to be permitted to employ women at night an employer was required to furnish transportation where public transportation was not available.

17. On July 17, 1965 the State regulations were amended to provide that an employer in a manufacturing establishment could employ women between the hours of 10 p.m. and 6 a.m. if that employer arranged for adequate transportation for women workers or if prompt public transportation was available or the individual worker had regular private transportation. CCH State Wage and Hour Citator ¶57,849.

18. Public transportation has not been available in Wellsboro, Pennsylvania.

19. Beginning on October 16, 1966, Corning has employed women between the hours of 12 midnight and 6:00 a.m. without providing transportation. To the best of defendant's knowledge, these employees have regular private transportation.

20. On November 14, 1969, the Attorney General of the State of Pennsylvania issued an opinion that the Pennsylvania law conditioning the ability of employers to employ women at night had been impliedly repealed by a 1969 amendment to the Pennsylvania Human Relations Act. (Act No. 56 of 1969, P.L. 744, as amended, 43 P.S. 951 *et seq.*)

21. In February, 1944, the American Flint Glass Workers' Union of North America negotiated a collective bargaining agreement covering the production and maintenance employees of the Wellsboro plant, including the inspectors who worked on the jobs of Inspector-Packer, Positioner-Inspector, Frost Light Inspector and Quality Inspector.

22. This contract provided that employees working a non-rotating night shift would receive a shift differential as a premium for such night work.

23. In addition to the new "shift differential", this contract continued in effect the existing differential in base rate between the steady night shift inspection jobs and the day and afternoon shift inspection jobs.

24. Similarly, all collective bargaining agreements entered into by Corning Glass Works with the Union, between the years 1944 and 1969 continued to maintain the differential in base rate between the steady night shift inspection jobs and the day and afternoon shift inspection jobs, except for minor variations caused by negotiation of percentage rather than flat rate increases.

25. The contract shift differentials have been and are as follows:

Date Contract Signed	*Afternoon*		*Night*	
	Rotating	*Non-Rotating*	*Rotating*	*Non- Rotating*
2-15-44	-	3¢		5¢
2-12-45	4¢	4¢	6¢	6¢
1-04-46	2¢	4¢	3¢	6¢
10-22-46	2¢	4¢	3¢	6¢
10-22-47	2¢	4¢	3¢	10¢
11-13-48	2¢	4¢	3¢	10¢
10-07-50	2¢	4¢	3¢	10¢
10-20-51	2¢	4¢	3¢	10¢
11-11-52	4¢	4¢	6¢	10¢
10-29-53	4¢	4¢	6¢	10¢
11-21-54	4¢	4¢	6¢	10¢
10-27-55	4¢	4¢	6¢	10¢
11-26-56	4¢	4¢	6¢	10¢
12-01-57	4¢	4¢	6¢	10¢
12-08-58	6¢	6¢	8¢	12¢
1-07-60	6¢	6¢	8¢	12¢
1-13-61	6¢	6¢	8¢	12¢
1-19-62	6¢	6¢	8¢	12¢
1-11-63	6¢	6¢	8¢	12¢
1-14-66	6¢	6¢	8¢	12¢
1-10-69	10¢	10¢	12¢	16¢

26. Effective February 2, 1969, Corning Glass Works paid, and is paying, a shift differential of 31 cents per hour for work on the steady night shift at its Charleroi, Pennsylvania, plant. All employees on the steady night shift receive the 31 cents an hour differential. Prior to the contract of February 2, 1969, the steady night shift differential was 10 cents per hour.

27. No other plant of Corning has had or has as high a steady night shift differential as 31 cents per hour.

28. The present range of steady night shift differential at Corning's other plants is 13 - 19 cents.

29. A Corning subsidiary, Components, Inc., pays a shift differential to all employees who work on the steady night shift which amounts to 20 percent of the employee's base hourly rate. This differential is paid to employees at 3 separate plants located in Biddeford, Maine, Kennebunk, Maine and Phoenix, Arizona.

30. From at least 1947 through October 15, 1966, only men were assigned to the job entitled Inspector-Packers Nights. The term "Nights" was dropped on January 20, 1969, and since that date employees on the night shift are simply designated as Inspector-Packers. There was no change in duties concurrent with dropping the "Nights" designation.

31. Since June 11, 1964 mechanization has resulted in the need for fewer employees to perform inspector-packer work. There is now an average of eight Inspector-Packers on each of the three shifts with a variation of between 4 to 15.

32. Since June 11, 1964, there have been no significant changes in the job entitled Inspector-Packer and the job entitled Inspector-Packer Nights for the period of its existence.

33. Each employee who, since at least June 11, 1964, has been classified as Inspector-Packer and Inspector-Packer Nights has actually performed and is actually performing the following duties:

> Packs bulbs or ornaments for shipment or for in-process storage. This work includes such duties as:

Moves empty carton from conveyor to packing stand, opens and inserts internal packing as required, closes full hamper and slides or lifts to take away conveyor.

Picks up 6 to 8 bulbs or ornaments at a time by grasping 3 or 4 between the fingers of each hand and bulk, tier, tray, or cell packs in hampers. Works rapidly, paced by the conveyor belt. When tier packing, alternates the bulbs up and down in rows. When tray packing, distributes the ornaments in one motion across the tray so that the neck of each ornament falls into proper position.

Uses hand fork to pick up bulbs from belt or from frost trays and bulk packs in hamper or in tote box.

Observes bulbs on belt and as handled and discards any bulb with obvious defects such as broken, cracked flare, twisted neck, etc.

Attends mechanical bulk packer, opening hamper and moving it to loading position, operating lever to start and stop flow of bulbs, placing paddle to break fall of first bulbs in each hamper, leveling bulbs in hamper, and moving hamper from loading position when full.

Maintains good housekeeping in work area.

In addition, male Inspector-Packers on the steady night shift have performed the additional duties set forth in #34 and 35, *infra*. The parties disagree, *inter alia*, as to the following:

(a) Whether the duties described in #34 and 35, *infra*, are part of the job of Inspector-Packer on the steady night shift for employees employed on or before January 20, 1969. With respect to employees hired subsequent to January 20,

1969, the parties are in agreement that the duties in #34 and 35, *infra*, are not a part of the job of Inspector-Packer.

(b) The amount of time spent by male Inspector-Packers on such duties.

(c) The number of male steady night shift Inspector-Packers who have performed these additional duties.

34. Male Inspector-Packers on the steady night shift are sometimes assigned to duties which are primarily of a materials handling nature. These assignments take place (1) as the result of interruptions in the production process, (2) to fill in for absentees in the Hiker classification and (3) to fill fluctuating personnel requirements in the materials handling area. At times, during such assignments, the men move stands, conveyors, scales, and other equipment. The other equipment is of no greater weight or bulk, and its movement requires no greater skill, effort or responsibility than moving the stands, conveyors and scales. At times the men are assigned to prepare packing work stations; make up hampers; weigh and adjust product quantities; seal and palletize filled hampers of product; properly identify hampers and pallets of ware and record count; move pallets and tote boxes and clean and sweep work areas. On the steady night shift only males have performed such additional duties. These duties are among the duties usually performed by employees classified as Hikers.

35. The work of sealing and palletizing filled hampers of product involves the following duties:

The pallet is 44½" wide x 67½" long x 4½" high. The parties are in agreement that in order to perform the function of sealing and palletizing, a stack of pallets is placed

in close proximity to the employee working on that job. The pallet must be removed by hand from the stack and placed on the floor. The employee places the pallet in ready position by picking up one end and sliding it on the floor to the desired location. However, mechanical means are available to the employees for use in moving the pallets to the desired location.

Hampers to be palletized have been sealed and are sitting on a 22" high conveyor. Each hamper is picked up and placed on the pallet in such a way that tiers are formed according to a specified pattern. The standard pallet load is 4, 5, or 6 tiers high depending on the hamper size and the shipping method to be used.

The parties are in disagreement as to whether inspectors move loaded pallets of ware.

Cord or reinforced tape is applied around the top tier of hampers on each pallet load to hold the load together.

36. In 1947 the differential in base hourly rates between the job of Inspector-Packer and Inspector-Packer Nights was 19 cents an hour.

37. The following maximum base hourly rates have been paid to employees with service dates on or before January 20, 1969, when performing the duties described in 33-35, *supra;*

	1/20/64 to 11/2/64	11/2/64 to 11/1/65	11/1/65 to 11/1/66	11/1/66 to 11/1/67	11/1/67 to ?	1/20/69 to 11/3/69	11/3/69 to 1/5/70	1/5/70 to 11/2/70	11/2/70 to 1/4/71	1/4/71 to Present
Night shift	$2.21½	$2.28½	$2.39	$2.45	$2.55	$2.77½	$2.89½	$2.92½	$3.04	$3.07
Day shifts	2.02½	2.09	2.19	2.25	2.34	2.60	2.72	2.74½	2.85½	2.88½
Differential	.19	.19½	.20	.20	.21	.17½	.17½	.18	.18½	.18½

The question mark in the fifth column is inserted because the parties are in disagreement as to the effect of the contract of January 10, 1969.

38. From at least 1947 through October 15, 1966, only men were assigned to the job of Frost-Light Inspector Nights. The term "Nights" was dropped from the job title on January 20, 1969, and the job continued to be performed on the night shift under the title of Frost Light Inspector. There was no change in duty concurrent with dropping the "Nights" designation.

39. An average of three employees are normally assigned as Frost-Light Inspectors on each of the three shifts.

40. Frost-light inspection is performed intermittently throughout the year. Employees performing this work are normally multiple-rate employees. The other jobs most likely to be carried as part of the multiple rate are Inspector-Packer and Visual Quality Inspector.

41. Each employee who, since at least June 11, 1964, has been classified as Frost-Light Inspector and Frost-Light Inspector Nights has actually performed and is actually performing the following duties:

> Inspects frosted ware for glass quality and frosting defects and for broken and cracked flares. Alternates between two positions performing duties such as:
>
> Inspects top of trayed ware held over inspection light. Removes all bulbs containing unsatisfactory visual defects such as frost spots or streak, splashed bulbs, clear spots, cracked flares, twisted necks, blisters, seeds, severe mold rings, etc. When majority of ware is bad, dumps whole tray. Also dumps trays when *Quality Inspector* signifies that ware is unsatisfactory for packing. Sets out trays when defects are such that they can be corrected by refrosting.

Inspects flare side of trayed ware (bottom side) as trays pass over inspection light. With long-handled mallet knocks out bulbs which are broken or have cracked flares.

Maintains proper flow of trays to packing position by operating tray drive chain switch or by setting out trays as necessary. Places automatic ejector pins in splashed or damaged trays. Wipes oil and grease from top of trays to protect bulbs as required.

Sets out trays rapidly to prevent jamming when take away chain, bulk packer, or tray tower fails.

Maintains good housekeeping in work area.

It is not stipulated that the foregoing description of duties sets forth all duties actually performed by employees who, since at least June 11, 1964, have been classified as Frost-Light Inspector Nights.

42. From 1947 to January 20, 1964, the differential in base hourly rates between employees working as Frost Light Inspectors and Frost Light Inspector Nights was 18 cents an hour.

43. The following maximum base hourly rates have been paid to employees with service dates on or before January 20, 1969, when performing the duties described in #41, *supra;*

	1/20/64 to 11/2/64	11/2/64 to 1/18/65	1/18/65 to 11/1/65	11/1/65 to 11/1/66	11/1/66 to 11/1/67	11/1/67 to ?	1/20/69 to 11/3/69	11/3/69 to 1/5/70	1/5/70 to 11/2/70	11/2/70 to 1/4/71	1/4/71 to Present
ift	$2.26½	$2.34	$2.34	$2.44½	$2.50½	$2.60½	$2.83½	$2.95½	$2.98½	$3.10½	$3.13½
ts	2.08½	2.15½	2.18½	2.28½	2.34½	2.44	2.74½	2.86½	2.89½	3.01	3.04
ial	.18	.18½	.15½	.16	.16	.16½	.09	.09	.09	.09½	.09½

The question mark is inserted in the sixth column because the parties are in disagreement as to the effect of the contract of January 10, 1969.

44. From at least September 24, 1949, through October 15, 1966, only men were assigned to the job entitled Quality Inspector Nights. From October 16, 1966, women have been able to exercise seniority rights to obtain Quality Inspector Nights job and the other inspection jobs involved in this case as vacancies occur or to bump into such jobs in event of reduction in force. The term "Nights" was dropped on January 20, 1969, and since that date employees on the night shift are also designated Quality Inspectors. There was no change in duties concurrent with the dropping of the "Nights" designation.

45. Presently each shift uses 3 to 5 Quality Inspectors with an average of 4.

45a. From at least September 14, 1948, through the week ending September 11, 1966, only men were assigned to the job of Positioner-Inspector on the steady night shift. The job of Positioner-Inspector on the steady night shift was eliminated on 9/11/66.

45b. From at least June 1964 to January 1, 1971, two employees normally were assigned as Positioner-Inspectors on each shift which worked.

45c. Since January 1, 1971, mechanization has eliminated the need for positioner-inspection work.

45d. Each employee who, from at least June 11, 1964 to January 1, 1971, was classified as Positioner-Inspector and Positioner-Inspector Nights actually performed the following duties:

> Positioned bulbs in runs of traying machine. Performed duties such as:

Picked up and positioned bulbs which failed to drop properly into the trayer lanes. Transferred bulbs from one lane to another as required so that an adequate supply was always available in each lane.

Discarded obviously defective bulbs such as broken or cracked flares.

Maintained good housekeeping in work area.

It is not stipulated that the foregoing description of duties sets forth all duties actually performed by employees who, from at least June 11, 1964 to January 1, 1971, have been classified as Positioner-Inspector Nights.

45e. In 1947 the differential in base hourly rates between the jobs of Positioner-Inspector and Positioner-Inspector Nights was 19 cents an hour.

45f. The following maximum base hourly rates have been paid to employees with service dates on or before January 20, 1969, when performing the duties described in #45d, *supra:*

	1/20/64 to 11/2/64	11/2/64 to 11/1/65	11/1/65 to 11/1/66	11/1/66 to 11/1/67	11/1/67 to ?	1/20/69 to 11/3/69	11/3/69 to 1/5/70	1/5/70 to 11/2/70	11/2/70 to 1/1/71
Night shift	$2.21½	$2.28½	$2.39	$2.45	$2.55	$2.77½	$2.89½	$2.92½	$3.04
Day shifts	2.02½	2.09	2.19	2.25	2.34	2.60	2.72	2.74½	2.85½
Differential	.19	.19½	.20	.20	.21	.17½	.17½	.18	.18½

The question mark is inserted in the fifth column because the parties are in disagreement as to the effect of the contract of January 10, 1969.

46. From at least June 11, 1964, to February 26, 1968, each employee who was classified as Quality Inspector and Quality Inspector Nights actually performed the following duties:

> Inspected any ribbon machine product for all glass, shop, dimensional and finishing defects, using inspection gauges and working from written ware specifications and drawings. (Ribbon machines are high speed blowing machines into which molten glass is fed from a tank.) This work included such duties as:
>
> Studied instruction sheet. Prepared control chart by drawing acceptance, control, process, and rejection limits. Inspected for accuracy, zeroed in, and adjusted as necessary all measuring equipment used.
>
> Inspected samples of ware for all visual defects such as mold rings, blisters, slack blown, chips, knots, poor frost, lacquer, or ceramic quality, etc. Used polariscope to check strain.
>
> Inspected samples of ware for designated dimensional defects such as neck, top, and side wall thickness, out of round, O.D., and I.D., using optical gauges, dial indicator, micrometer, go-no-go gauges, etc.
>
> Recorded and plotted results on control charts. Accepted or rejected ware according to prescribed limits. Recalculated control limits according to a standard procedure for control, rejection, and process limits.

Performed bump test on frosted bulbs, immersion and humidity tests on lacquered ornaments, checks uniformity of ceramic coating, etc.

Maintained good housekeeping in work area.

It is not stipulated that the foregoing description of duties sets forth all duties actually performed by employees who, from at least June 11, 1964, to February 26, 1968, have been classified as Quality Inspector Nights.

47. Since February 26, 1968, each employee classified as Quality Inspector and Quality Inspector Nights has been and is actually performing the following duties:

Inspects any ribbon machine product for all glass, shop, dimensional, and finishing defects, using inspection gauges and working from written ware specifications and drawings. This work includes such duties as:

Studies instruction sheet. Prepares control chart by drawing acceptance, control, process, and rejection limits. Records and plots results of visual, dimensional, and distributional inspection. Inspects for accuracy, zeros in, and adjusts as necessary all measuring equipment used.

Inspects samples of clear and frosted ware for all visual defects such as mold rings, blisters, slack blown, chips, knots, poor frost, etc. Inspects finished ware for additional visual characteristics such as silver and enamel quality on ornaments or bulbs, contour and color of decorative lamps, cap and wire formation on ornaments, condition of neck and glaze on cut bulbs, etc. Uses polariscope to check strain.

Inspects samples of ware for designated dimensional defects such as neck, top, and sidewall thickness, out of round, O.D. and I.D. measurements, overall length, squareness of cut, toe in, contour and length of formed tip, etc. Uses gauges, dial indicator, micrometer, contour gauges, go-no-go gauges, etc.

Accepts, rejects, or holds ware for reinspection based on inspection results; notifies supervisor and other designated persons of inspection results.

Checks hourly for proper sealing and physical condition of hampers, and tape for correct information and legibility of printing. Notifies foreman of any unacceptable condition and may hold ware if these conditions are not corrected.

Reports losses of samples and selects defect sample candidates for supervisor's approval. Performs bump test on frosted bulbs, immersion and humidity tests on ornaments, checks uniformity of ceramic coating, etc.

Reports to supervisor loss or damage to any departmental equipment.

It is not stipulated that the foregoing description of duties sets forth all duties actually performed by employees who, since at least February 26, 1968, have been classified as Quality Inspector Nights.

48. On September 24, 1949, the differential in base hourly rates between the jobs entitled Quality Inspector and Quality Inspector Nights was 20 cents an hour. Due to percentage increases the differential increased over the years to 25½ cents an hour by 1969.

49. The following maximum base hourly rates have been paid to employees with service dates on or before January 20, 1969, performing the duties described in #46 and 47, *supra*, at the times therein indicated:

	1/20/64 to 11/2/64	11/2/64 to 11/1/65	11/1/65 to 11/1/66	11/1/66 to 11/1/67	11/1/67 to ?	1/20/69 to 11/3/69	11/3/69 to 1/5/70	1/5/70 to 11/2/70	11/2/70 to 1/4/71	1/4/71 to Present
ght shift	$2.375	$2.45	$2.56	$2.62	$2.725	$2.965	$3.085	$3.115	$3.24	$3.27
y shifts	2.165	2.235	2.335	2.395	2.49	2.79	2.91	2.94	3.06	3.09
ferential	.210	.225	.225	.225	.235	.175	.175	.175	.18	.18

The question mark in the fifth column is inserted because the parties are in disagreement as to the effect of the contract of January 10, 1969.

50. The Wellsboro plant produces glass envelopes for incandescent bulbs (clear and frosted), radio receiver bulbs, photo flash bulbs, and Christmas tree ornaments. The molten glass flows from a tank with three faucets into high speed automatic blowing machines, called ribbon machines. There are seven ribbon machines in the plant. Normally there are three ribbon machines in operation.

51. The inspectors work on the three production lines coming out of the ribbon machines or in finishing operations. These work stations are referred to as positions 721, 722 and 723. Inspectors also work at a supplemental furnace for three or four months a year at a position referred to as 712.

52. Inspector-Packers and Quality Inspectors work at positions 721, 722, 723 and 712.

53. The job of Positioner-Inspector on the steady night shift was eliminated on September 11, 1966, and since that time it has been performed only on the day shift.

54. The job of Positioner-Inspector was eliminated January 1, 1971. During the time that it existed it was performed at No. 4 Frost Traying Unit, which is integrated with position 722.

55. The Frost Light Inspectors work at positions on Frost Units, which are involved in the frosting operation. One position is No. 4 Frost Unit which is integrated with #722 position. They also work on another position not fed by a machine. At this position ware which has previously been packed and put into the warehouse is unpacked, put on trays (referred to as "traying") and frosted. Interruptions at this position occur when the frosting solution fails.

56. Interruptions on the production line are of two general types—scheduled and unscheduled. The scheduled interruptions involve change of product; change of molds or other equipment; maintenance and repair work and change of pack. The unscheduled ones usually involve equipment breakdown or poor quality product. Corning tries to schedule predictable interruptions for the day shifts.

57. Daily operators' reports are kept for each shift. These report the intervals when glassware is not being inspected at each inspection position due to interruptions. March 1971 was a typical month.

58. At position 721 during March 1971 the operators' reports show no interruptions during 26 of the 31 night shift operations. On March 10 there was a 25 minute interruption. On March 18 there was [sic] a 12 minute interruption for a change. On March 22 there was a five minute interruption, for an unindicated reason. On March 23 there

was a one hour and 45 minute interruption due to machine failure. On March 26 there was a one hour and 15 minute interruption due to an operational problem.

59. At position 722 during March 1971 the operators' reports show no interruptions during 24 of the 31 night shift operations. On March 2 there was a 20 minute interruption for an unindicated reason. On March 6 there was a five minute interruption for a loose plate. On March 9 there was a 25 minute interruption for an unindicated reason. On March 16 there was a 25 minute interruption for an unindicated reason. On March 19 there was a 35 minute interruption for a mold change. On March 23 there was a 25 minute interruption for an unindicated reason. On March 30 there was a 25 minute interruption for an unindicated reason.

60. At position 723 during March 1971 the operators' reports show no interruptions for 27 of the 31 night shift operations. On March 7 there was a 25 minute interruption for an operational problem and a 15 minute interruption for an unindicated reason. On March 15 there was a 50 minute interruption for a type change. On March 24 there was a 15 minute interruption for an unindicated reason. On March 28 there was an hour interruption for a check and reset of the machine.

61. Inspectors worked at position 712 in March 1971 for 12 days. The operators' reports show no interruptions for 7 of the 12 night shift operations at this position. On March 2 there was a 40 minute interruption because thin sides on the ware was being produced. On March 10 there was a 20 minute interruption to change rolls and a 15 minute interruption because the mold latch was locked. On March 15 there was a 40 minute interruption for a type change. On March 17 there was a 4 hour and 20 minute delay in starting

production. On March 18 the production run ended after 1½ hours of operation.

62. Interruptions in the work of Frost Light Inspectors on the night shift at the position referred to in #55, *supra*, as not being fed by a machine occur at about the same frequency as those in #57-61, *supra*.

63. During interruptions, at times, some inspectors on all shifts are assigned to the reinspection belt. The reassigned female inspectors and some of the reassigned male inspectors on all shifts engage in inspecting and repacking the ware at the belt. The inspection at this belt is primarily for broken bulbs. This is work within the Inspector-Packer job classification.

64. On the steady night shift some male inspectors are reassigned to open and empty the hampers onto the reinspection belt and, at the other end of the line, seal and palletize the cartons of ware and also perform the work set forth in the last 3 sentences of #34, *supra*. All of this work is performed by Hikers on the day shift.

65. At times there is a regular crew of Inspector-Packers which works at the reinspection belt. This crew is used to relieve inspectors at other work stations.

66. The job of Hiker has traditionally been performed by men.

67. Three to 13 men work as Hikers assisting Inspector-Packers, Frost Light Inspectors, Positioner-Inspectors, and Quality Inspectors on the morning and afternoon shifts. Three to 13 men work as Hikers assisting such inspectors on the night shift.

68. During interruptions on the production line, some female employees not assigned to removing broken bulbs and repacking the bulbs at the reinspection belt are assigned to traying bulbs for frosting which involves picking them up and putting them in a carton or on a tray.

69. The tasks of the inspectors set forth in paragraphs 34, 35 and 64, *supra*, have never been reflected in Corning's job description of the inspection jobs involved in this case.

70. [Deleted].

71. Men with a plant seniority date subsequent to January 20, 1969, assigned to the job of Inspector-Packer on the steady night shift are paid the base hourly rate for Hiker when assigned to material handling duties during interruptions to the production lines. For example on January 5, 1970, the following rates applied to men assigned as Inspector-Packers on the steady night shift:

	Base Hourly Rate for Inspector-Packer Work	*Base Hourly Rate for Hiker Work*
Those with seniority subsequent to 1/20/69	$2.74½	$2.86 or 11½¢ more
Those with seniority of or prior to 1/20/69	2.92½	2.92½
Differential	$ .18	$ .06½

72. Male and female inspectors employed prior to January 20, 1969, who work on the steady night shift inspection jobs involved in this case are paid at the same base hourly rate.

73. Male and female inspectors employed prior to January 20, 1969, who work on the day shifts on the inspection jobs involved in this case are paid at the same base hourly rate.

74. Female inspectors in the same classification, perform the same duties on all shifts during production time and interruption time. Night shift male and female inspectors hired prior to January 20, 1969, receive the same rate of pay and receive a higher base hourly rate than day shift male and female inspectors, of comparable seniority.

75. The following maximum rates have been paid for the job of Hiker, effective on the dates indicated:

1/20/64	—	$2.165
11/ 2/64	—	2.235
1/18/65	—	2.235
11/ 1/65	—	2.335
11/ 1/66	—	2.395
11/ 1/67	—	2.49—
1/20/69	—	2.71
11/ 3/69	—	2.83
1/ 5/70	—	2.86

76. The CGW Job Evaluation Plan evaluates the jobs of Inspector-Packer, Frost Light Inspector, and Quality Inspector in relationship to other jobs in the Corporation and to each other. Plaintiff does not know whether and makes no claim that the CGW Plan itself evaluates these jobs in other than a fair, equitable and non-discriminatory manner. Plaintiff does know that the evaluation of the respective jobs as they are performed on each shift is proper.

77. Until October 16, 1966, defendant maintained separate "male" and "female" seniority lists.

78. When there were separate "male" and "female" seniority lists women did not work on inspection jobs on the night shift, and men did not work on inspection jobs on the day shifts.

79. At the Wellsboro plant, on October 16, 1966, by mutual agreement between the union and Corning, women were henceforth permitted to exercise their seniority to claim jobs on the steady night shift.

80. Women immediately transferred to fill vacancies on the steady night shift inspection jobs on October 16, 1966. Four women, A. B. Fisher, J. Y. Perry, E. F. Starkweather, and J. E. Stocum, worked as Inspector-Packers on the steady night shift on October 16, 1966. Two additional women, J. M. Copp and E. P. Abernathy, began work on the steady night shift on October 17 and October 18, 1966, respectively.

81. Non-bid jobs are filled through employee transfer requests in which the employee states a desire to move to a particular job or a particular shift. Transfer requests may be filed at any time and are granted, as job openings occur, with employees having the greatest plant-wide seniority receiving first preference among equally qualified transfer applicants.

82. Vacancies on the night shift for non-bid jobs are not posted.

83. The following jobs are non-bid jobs: Inspector-Packer and Hiker. Positioner-Inspector was a non-bid job prior to its elimination.

84. The Wellsboro plant employs approximately 92 women and 388 men.

85. Between October 16, 1966, and June 28, 1970, 59 different men and 120 different women were employed as Inspector-Packers on the steady night shift. During this

period there were 355 separate vacancies of which 92 were filled by men and 263 by women.

86. On March 30, 1971, there were no men regularly working on the day shifts as Inspector-Packer, but there have been a few. No man has ever gone from the job of Inspector-Packer on the steady night shift to that job on the day shifts.

86a. No man has ever gone directly from the jobs of Frost Light Inspector, Quality Inspector or Positioner Inspector on the steady night shift to those jobs of the day shifts.

87. Between October 16, 1966, and June 28, 1970, at various times, ten men and eight women were employed as Quality Inspectors on the steady night shift.

88. Between October 16, 1966, and June 28, 1970, 128 women used their seniority to take jobs as Inspector-Packers, Frost Light Inspectors, and Quality Inspectors on 276 separate openings on the steady night shift. During that period there were a total of 395 openings on these jobs on the steady night shift.

89. Men and women who work the inspection jobs on the steady night shift receive the night shift base hourly rate, plus the contract night shift differential.

90. Similarly, men and women assigned to inspection jobs on the day or afternoon shifts receive the day base hourly rate, the same rate as women who worked the day and afternoon shifts, plus the contract afternoon shift differential where appropriate.

Stipulations of Facts.

91. On January 11, 1963, defendant and the American Flint Glass Workers' Union, including Local 1001 (hereinafter referred to as the unions) entered into a collective bargaining agreement, which was to remain in effect until January 20, 1965.

92. On January 24, 1964, the contract was reopened and amended. The amended contract provided that all hourly wages rates were to be increased 2½ cents an hour effective January 20, 1964, and 3¼ per cent, adjusted to the nearest one-half cent, effective November 2, 1964. A no discrimination clause was added. It was agreed "that there will be no discrimination between employees or applicants for employment for reasons of race, creed, color, or national origin and to comply with State and Federal Laws pertaining thereto." It provided fringe benefits relating to vacations, holidays, pensions, and insurance. It made changes as to seniority and to article XVII on working conditions and methods. It extended the term of the contract to January 20, 1966.

93. On January 14, 1966, a collective bargaining agreement was executed by defendant and the unions providing for across-the-board increases for all employees covered by the agreement and certain fringe benefits.

94. On January 10, 1969, Corning and the union agreed upon and executed a new three-year collective bargaining agreement. That agreement provided for the installation of a new job evaluation plan called the Corning Glass Works Job Evaluation Plan (the CGW Plan), subject to ratification of that plan by the union membership.

95. The CGW plan was ratified on January 17, 1969, and was installed effective January 20, 1969.

96. On January 10, 1969, a new collective bargaining agreement was executed by Defendant and the union which provided for increases for all hourly-rated employees and certain fringe benefits.

97. Under the agreement of January 10, 1969, all employees received a payment, commonly called "retroactivity pay", which was calculated in accordance with an agreed upon formula.

(a) This payment did not compensate employees for work performed on a particular job.

(b) The amount was determined by an arbitrary calculation based upon:
[rate of job held on January 12, 1969 x 8%, adjusted to nearest ½ cent] or [20 cents per hour], whichever is greater, x number of hours paid between November 4, 1968, through January 12, 1969

plus

the job evaluation adjustment for the employee's rate for the job held on January 19, 1969 x the sum of hours paid from November 11, 1968, through January 19, 1969

equals

total retroactivity pay

98. No employee received a wage increase under the agreement of January 10, 1969, until the contract was executed on January 10, 1969.

99. Prior to January 20, 1969, the CGW Plan was not in effect with respect to any jobs in the Wellsboro plant.

100. The rates paid to employees in accordance with job evaluations arrived at under the CGW Plan were first paid

subsequent to the execution of the collective bargaining agreement of January 10, 1969.

101. Under the CGW Plan as agreed upon and installed, all employees hired after January 20, 1969, are paid the evaluated rate for that job without regard to whether they work at night or during the day or whether they are men or women.

102. Under the agreement, all employees hired after January 20, 1969, as Inspector-Packers, Frost Light Inspectors, Positioner-Inspectors, and Quality Inspectors, are to be paid the job evaluated rate, regardless of sex and regardless of the shift worked.

103. Under the Plan and the January 10, 1969, collective bargaining agreement the job evaluated rates of the jobs of Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector were $2.60, $2.745, $2.60 and $2.79, respectively. The job evaluated rates for these jobs are paid to all persons employed on the day shifts regardless of their date of hire.

104. Under the agreement of January 10, 1969, Defendant agreed to pay all employees, regardless of sex, who were employed on or before January 20, 1969, the maximum hourly rates of $2.775, $2.835, $2.775 and $2.965, when employed as Inspector-Packers, Frost Light Inspectors, Positioner-Inspectors, and Quality Inspectors, respectively, on the steady night shift. Such rates were subject to improvement, along with the rates of all other jobs covered by the agreement, by agreed upon periodic wage increases.

105. Prior to the agreement of January 10, 1969, the maximum hourly wage rates, on the steady night shift, for

the jobs of Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector were $2.55, $2.605, $2.55 and $2.725, respectively.

106. The maximum wage rates for Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector under the January 10, 1969, agreement were higher than either the maximum day, afternoon, or night rates for those respective jobs prior to that agreement.

107. On January 20, 1969, when the CGW Plan was installed, the job evaluation rates for Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector were lower than the rates being paid to employees working on these jobs on the night shift.

108. Since 1944 every collective bargaining agreement has contained Article 15, Section 2, which provides:

> When job evaluation * * * results in wage brackets lower than prevailing rates than paid for the job it is not the intention of the company to reduce the prevailing base rates of employees currently working on such jobs.

109. Paragraph 9 of Schedule A of the installation rules of the CGW Plan provides:

> Any employee who as of the date of the installation of the CGW Hourly Job Evaluation Plan is an employee of the Wellsboro plant covered by the terms of the Basic Agreement and who thereafter by operation of rights under the Basic Agreement continues to hold or takes any of the jobs specified on the [night] shift shall receive the rate which he or she would have re-

ceived for that work under pre-existing practices. Those jobs being:

Inspector-Packer (N)
Positioner-Inspector (N)
Frost Light Inspector (N)
Quality Inspector (N)

Persons who become employees after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs.

110. The explanation of "pre-existing practices" in paragraph 9 of Schedule A to the installation rules of the CGW plan is the same as that given in Corning's answer I filed January 26, 1971, in *Hodgson* v. *Corning Glass Works*, USDC WD N. Y., Civil No. 1967-29, namely that it refers to "an extension of Corning's past practice that, regardless of the fact that a new system of job evaluation was being installed that none of the people who were employed at the time of the agreement would receive less money for performing a job subsequent to the agreement than they had received prior to the agreement."

111. The rates paid under paragraph 9 are called "red-circle" rates by Corning.

112. Under the agreement of January 10, 1969, male and female inspectors employed on or prior to January 20, 1969, receive a lower hourly base rate if and when they move from an inspection classification on the night shift to the same inspection classification on the day shifts. The rates on both the steady night shift and the day shifts, subsequent to the agreement of January 10, 1969, are higher than the highest rate paid for work on either shift prior to the agreement of January 10, 1969.

113. Employees with service dates after January 20, 1969, receive the same base hourly rate on all shifts when classified as Inspector-Packers, Frost Light Inspectors and Quality Inspectors.

114. The maximum base wage rate of the job of Inspector-Packer and Positioner-Inspector on the day shift immediately *prior* to the agreement of January 10, 1969, was $2.34 per hour.

115. The maximum base wage rate of the job of Frost Light Inspector on the day shift immediately prior to the agreement of January 10, 1969, was $2.44 per hour.

116. The maximum base wage rate of the job of Quality Inspector on the day shift immediately prior to the agreement of January 10, 1969, was $2.49 per hour.

117. From January 20, 1969 through December 28, 1970, (through to only June 28, 1970 for night jobs) the distribution of male and female inspectors has been as follows (using the initials of the jobs in issue):

	Seniority	*I-P*		*P-I*		*F-L-T*		*Q-I*	
		Days	*Nights*	*Days*	*Nights*	*Days*	*Nights*	*Days*	*Nights*
Women	1/20/69 or before	160	31	5	0	7	0	23	5
Men	1/20/69 or before	4	19	0	0	0	4	0	5
Men	After 1/20/69	22	2 (for a total of 5 weeks)	0	0	0	0	0	0
Women	After 1/20/69	1	4 (for a total of 12 weeks)	0	0	0	0	0	0

118. Eighteen women and seven men worked as Inspector-Packers on the steady night shift on the week ending August 15, 1971.

119. Two women and three men worked as Quality Inspectors on the steady night shift on the week ending August 15, 1971.

120. From October 16, 1966, through December 28, 1969, 29 women and no men were moved from the steady night shift as Inspector-Packers to the day shifts as Inspector-Packers at a lower base hourly rate than they had received on the steady night shift.

121. Plaintiff does not claim, at this time, that Defendant is in violation of the Equal Pay Act with respect to employees hired subsequent to January 20, 1969, because so few employees in this category have worked in the jobs in issue that the net effect of Corning's pay practices as to them cannot be determined.

122. After an investigation, the complaint in this case was filed on October 2, 1969.

/s/ RICHARD F. SCHUBERT
Solicitor of Labor

/s/ LOUIS WEINER
Regional Solicitor

/s/ ISABELLE R. CAPPELLO
/s/ STEPHEN K. ERNST
Attorneys for Plaintiff

/s/ JOHN G. WAYMAN
/s/ SCOTT F. ZIMMERMAN
Attorneys for Defendant

[Filed, January 3, 1972]

• • • •

STIPUATIONS OF FACTS TO WHICH DEFENDANT EITHER MAKES OBPECTION OR WITHDRAWS A PRIOR OBJECTION.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

5.1 (a)

(As Revised At Trial)

Pursuant to Paragraph 3.1 of this Court's Pre-Trial Order of June 3, 1971, the parties to the above cause stipulated to all uncontested facts. Those stipulations to which Defendant raised no objection were submitted at the pre-trial conference on October 5, 1971, by Plaintiff as pleading 5.1 "Stipulation of Facts". Those stipulations concerning which Defendant raised objection as to admissibility were not included in pleading 5.1 but were contained in a pleading submitted at the October 5 pre-trial conference and entitled 5.1(a) "Objections by Defendant to Certain Stipulations of Facts".

On October 12, 1971, Defendant filed a "Brief in Support Of Both General and Specific Objections By Defendant To Certain Proposed Stipulations Of Fact And To Admission Into Evidence Of Plaintiff's Interrogatories, Requests For Admission, Depositions, And The Answers Thereto."

At the trial of this case certain of the stipulations contained in pleading 5.1(a) were either modified or eliminated by agreement of the parties. At the trial the Court accepted the stipulations in pleading 5.1 (a) subject to such modification agreed to by the parties in open court and subject to Defendant's objections raised in 5.1(a), its brief, and at the trial. (Tr. Vol. II, 177) At the conclusion of the trial

the Court directed Defendant to restate its objections to the documentary material submitted by Plaintiff. (Tr. Vol. IV, 89-92)

The following stipulations contained in the original pleading 5.1(a) were eliminated at the trial by agreement of the parties at the indicated points in the transcript:

Stipulation D-34, on page 11 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 177-180.

Stipulation P-49, on page 11 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 180-181.

Stipulation P-51, on page 12 of the original pleading 5.1 (a), was eliminated at Tr. Vol. II, 182.

Stipulation P-121, on page 14 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 184.

Stipulation P-145, on page 14 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 183.

Stipulation P-162, on page 14 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 183.

Stipulation P-67, on page 20 of the original pleading 5.1(a), was eliminated at Tr. Vol. IV, 69.

Stipulation P-61, on page 20 of the original pleading 5.1(a), was eliminated at Tr. Vol. II, 185.

Stipulation P-75, on page 22 of the original pleading 5.1(a), was eliminated at Tr. Vol. IV, 69.

In an attempt to expedite the ultimate determination of the above cause, Defendant has decided to drop its objection

to any of the stipulations contained in the original pleading 5.1(a) which were objected to therein only on the grounds of relevance and materiality. Although Defendant has not altered its opinion as to the relevance and materiality of the various subject matters to which those stipulations relate, this Court, sitting in equity, can properly evaluate the weight to be given the facts set forth in those stipulations. Further, considerable live testimony has been admitted as relevant in areas covered by these stipulations. If that testimony is to be deemed relevant, these stipulations will make it comprehensible.

Below listed are those stipulations to which Defendant raised an objection in the original 5.1(a) preceded by a statement as to the grounds, if any, for a present objection to that stipulation or a statement that no objection is made to the admissibility of that stipulation.

Stipulation P-10 is stated as amended by the parties, in regard to the spelling of "area", at Tr. Vol. IV, 69. Stipulation P-197 is stated as amended by the parties, in regard to the insertion of "P-11" in line 6 thereof, at Tr. Vol. IV, 70. Stipulation P-13 is stated as amended by the parties, in regard to the spelling of "located", at Tr. Vol. IV, 70. Stipulation P-65 is stated as amended by the parties at Tr. Vol. II, 182. Stipulation P-66 is stated as amended by the parties at Tr. Vol. II, 182.

Stipulation P-112 is stated as amended by the parties at Tr. Vol. II, 188-90. Stipulation P-113 is stated as amended by parties at Tr. Vol. II, 191. Stipulation 119.1 is stated as amended by the parties at Tr. Vol. IV, 72. The other stipulations are stated as they were in the original pleading 5.1(a).

are objected to on the grounds that they are not relevant or material to the subject matter of Plaintiff's cause of action; they are inadmissible under the "work product" privilege; they involve mental impressions, conclusions, opinions, and/or legal theories of an attorney and other representatives of the Defendant concerning matters which are the subject of the present litigation; finally, they involve hearsay evidence.

* * * *

P-6 On May 4, 1964, Charles Francik, an attorney employed by Defendant, sent advice and material to Wellsboro officials, as well as to officials of other plants concerning the Equal Pay Act and its implications and to serve as guidance in determining possible Equal Pay Act violations and providing a method by which these could be recorded. Any possible violations were to be referred back to officials in Corning, New York. The plant managers were advised to have their personnel supervisor review the material with the plant industrial engineer. Richard Marks, who at that time was personnel supervisor of the Bradford plant, could not recall having seen the material which was sent to the Bradford plant manager.

P-10 On July 14, 1964, F. P. Hunt, Vice President of Industrial Relations, sent a memorandum entitled "Compliance with the Equal Pay Act of 1963" to all Defendant's plant managers, including the Wellsboro plant, to various officials in Corning, New York, and to its Washington, D. C., representative. Mr. Hunt asked to be advised of any

contacts made by representatives of the Wage and Hour Division of the Department of Labor so that activity in this area could be coordinated.

Stipulations P-11, P-196, and P-197

are objected to on the grounds that they are not relevant or material to the subject matter of Plaintiff's cause of action; they involve statements which are conclusions and/or opinions as to law and/or fact; finally, they involve hearsay evidence.

• • • •

P-11 On January 24, 1966, John E. Kilburn, an investigator for the Wage and Hour Division of the Department of Labor met with several representatives of Defendant, including John W. Randall, at that time Manager of Employee Relations, Corning plants, J. R. Palme, Assistant to Director of Industrial Relations, and John G. Wayman, counsel for Defendant. Mr. Kilburn stated that the purpose of the meeting was to advise Defendant of the Department of Labor's position that violations of the Act's equal pay provisions were occurring at its main plant in Corning, New York, in that female inspectors in several classifications on the day and afternoon shifts were being paid a lower base hourly rate than male inspectors in the same classifications on the steady night shift. Mr. Kilburn stated that the Department of Labor's position was that the base hourly rates of the women on the day and afternoon shifts should be raised to that of the men and restitution paid. Mr. Kilburn advised them that it was the Department of Labor's position that compensation for working

at night was already paid to the men in the form of the plant wide shift differential paid to all production employees under the collective bargaining agreement, and that working at night did not explain the higher base hourly rate paid to the men.

P-196 Between January 24, 1966, and January 18, 1967, attorneys for Corning and the Department of Labor conferred about the alleged violations at the main plant.

P-197 On January 18, 1967, a conference was held at the United States Department of Labor in Washington, D. C., concerning the alleged violations of the Equal Pay Act by Corning Glass Works at its main plant in Corning, New York, which were the subject of the January 24, 1966, conference with Mr. Kilburn set forth *supra,* no. P-11. Representing the Corning Glass Works were John Wayman of Reed, Smith, Shaw & McClay, counsel, Michael E. Palatas, Manager of Employee Relations, and Paul Ohliger, Assistant to the Director of Industrial Relations. Representing the Department of Labor were Clarence Lundquist, Administrator of the Wage and Hour Division, Bessie Margolin, Associate Solicitor, James Miller, Deputy Associate Solicitor, and Francis LaRuffa and Isabelle Cappello, attorneys. Also present were officials and counsel for the International American Flint Glass Workers and its Local 1000. At this meeting the officials of Corning Glass Works were informed that compliance with the Equal Pay Act could only be achieved by raising the base hourly rates of all Class C, B, TV and General TV inspectors in A Factory, B & C Factory, and Pressware to the rate being paid to the men and women inspectors so classified on the steady night shift in these plants.

Additional Stipulations of Facts.

Stipulation P-12

is objected to on the grounds that it is not relevant or material to the subject matter of Plaintiff's cause of action. [The disposition of P-12 is related to the court's decision regarding P-11 on page 6, *supra*.]

• • • •

P-12 On January 26, 1967, after a series of conferences attempting to settle the matter had failed, Plaintiff filed a complaint in the United States District Court for the Western District of New York alleging the aforesaid as violations of the Act.

Stipulation P-13

is objected to on the grounds that it is not relevant or material to the subject matter of Plaintiff's cause of action; it involves statements which are conclusions and/or opinions as to law and/or fact; finally, it involves hearsay evidence.

• • • •

P-13 During the trial of the above case, on July 9, 1969, F. Philip Hunt, the Defendant's Vice President who was in charge of industrial relations, testified that to his knowledge two other branch plants had situations similar to that being litigated. One of the plants named was the Wellsboro, Pennsylvania, plant. The other named was the one located in Central Falls, Rhode Island.

Additional Stipulations of Facts.

Stipulations P-52, P-53, P-54, D-40, D-41, P-55, P-56, P-105, P-106, P-123, P-124, and P-171

(all of which essentially involve the Corning job evaluation plan called the "CGW Plan"), are objected to on the grounds that they are not relevant or material to the subject matter of Plaintiff's cause of action; they involve conclusions and/or opinions as to law and/or fact; finally, they involve hearsay evidence.

* * * *

P-52 Under the CGW Plan the job descriptions are written and evaluations are made by the Wellsboro plant industrial engineering department. They are then submitted to the central industrial engineering group in Corning, New York, for approval and correlation with similar jobs throughout the Company plants.

P-53 Under the CGW Plan, each job is supposed to be reviewed once a year to determine whether a change has occurred.

P-54 The factors considered in evaluating a job under the CGW Plan are: Manual and visual effort; manual accuracy; manual complexity; job knowledge: responsibility for problem solving, materials and/or product, equipment and/or tools and direction of others; surroundings and hazards.

D-40 The CGW Plan does not take into account whether the jobs are performed on a steady night shift or on day shifts.

D-41 Under the CGW Plan the job descriptions and evaluations for the respective inspection jobs here in issue have been the same on all shifts since first made by Corn-

ing's job analysts in 1964. The job description and evaluation for the job of Inspector-Packer was typed on March 13, 1964, and was made effective in unchanged form on March 7, 1969. The job description and evaluation for the job of Positioner-Inspector was typed on March 13, 1964, and was made effective in unchanged form on March 10, 1969. The job description and evaluation for the job of Frost Light Inspector was typed on November 9, 1964, and was made effective in unchanged form on March 7, 1969. The job description and evaluation for the job of Quality Inspector was typed on March 13, 1964, changed pursuant to combining with the job of Quality Control Inspector and retyped on February 27, 1968, and made effective as retyped on March 7, 1969.

P-55 The evaluated points for the inspection jobs in issue and the job of Hiker under the CGW Plan are as follows:

	I-P	*P-I*	*F-L-T*	*Q-I*	*Hiker*
Effort:					
Manual	60	60	70	60	85
Visual	45	45	75	75	45
Skill:					
Manual accuracy	125	125	135	135	125
Manual complexity	105	105	105	105	105
Job knowledge	115	115	115	120	115
Responsibility for:					
Problem solving	155	155	155	170	155
Direction of others	0	0	0	0	0
Material or product	110	110	120	145	110
Tools or equipment	100	105	100	105	100
Working conditions:					
Surroundings	30	40	55	40	40
Hazards	40	40	40	40	55
	885	900	970	995	935

Additional Stipulations of Facts.

P-56 The installation rules of the CGW Plan provide that employees hired prior to January 20, 1969, who work as steady night shift Inspector-Packers, Frost Light Inspectors and Quality Inspectors receive a higher base hourly rate than employees working on these jobs on the day shifts. It is in addition to the plant-wide shift differential paid for night work. It is referred to as a "red circle" rate.

P-105 In measuring manual effort under the CGW Plan, infrequent and unusual effort are not considered and tasks enumerated are not exhaustive of all duties performed but are only examples of the type of work performed.

P-106 The job description of a Hiker does not list moving a bulk packer as a typical task performed.

P-123 The Inspector-Packer job description was first drafted and a trial evaluation was drafted under the CGW Plan on March 13, 1964. That job has always been described the same on all shifts and evaluated at the same points as to all factors considered which include skill, effort, responsibility and working conditions.

P-124 Under the CGW Plan each hourly job classification is reviewed once each year or when any change occurs. The job analyst himself checks the job and talks to the employees performing it, the supervisor and the departmental union representative, if there is one. The job review is then submitted to the Corning, New York, job evaluation department where it is also reviewed.

P-171 The job description for Hiker effective January 20, 1969, reads as follows:

Additional Stipulations of Facts.

"DESCRIPTION Performs a variety of material handling duties, working by hand or using a hand lift truck as required. This work includes such duties as: Services inspection, loading, and packing positions: opens hampers of ware, places on stand or conveyor or dumps into hopper or on belt. Makes up hampers using hand tape machine, supplies hampers, internal packing material, ornament caps, etc., to packing positions, weighs filled hamper, adjusting count as necessary, seals, and palletizes. Moves pallets in and out, using hand trucks as required.

Moves tote boxes to loading position. Elevates box, observes filling, lowers box and distributes bulbs as as required. Moves box to scale and adds or removes bulbs to balance.

Identifies ware by placing proper information in tape machine type roll or by attaching stickers, tags, etc. to hampers, pallets, or tote boxes. Maintains count of pallets loaded and reports to supervisor.

Prepares working areas positioning stands, tables, conveyors, etc., adjusting bulb guides, tape machine, etc. Sweeps and cleans area, removes cullet cans, etc., maintaining good housekeeping conditions at all times.

Removes splashed frost trays from run, washes, and returns to run. Changes tray types as required.

Makes trips to storeroom for supplies, trips to various plant areas to deliver supplies, etc., as directed.

Maintains good housekeeping conditions in working area."

Additional Stipulations of Facts.

Stipulations P-48, P-50, P-62, P-64, P-65, P-66, P-122, and P-170

(all of which essentially involve the job evaluation plan called the "SJ&H Plan"), are objected to on the grounds that they are not relevant or material to the subject matter of Plaintiff's cause of action; they involve conclusions and/or opinions as to law and/or fact; finally, they involve hearsay evidence.

P-48 Under the SJ&H Plan, the plant industrial engineer wrote or supervised the writing of job descriptions. They were then presented to the central industrial engineering group in Corning, New York, who evaluated them.

P-50 The evaluated points for the inspection jobs in issue and the job of Hiker under the SJ&H Plan were as follows, using the initials of the inspection jobs:

	I-P *I-P-N**	*P-I* *P-I-N**	*F-L-I* *F-L-T-N**	*Q-I* *Q-I-N**	*Hiker*
Schooling	40	40	40	50	20
Training	80	80	100	120	60
Skill	30	30	30	45	30
Versatility	20	20	20	40	20
Knowledge	30	30	45	60	30
Responsibility	50	50	50	100	50
Surroundings	0	0	20	0	10
Hazards	0	15	15	0	15
Total	250	265	320	415	235

* "N" stands for "Night"

P-62 As an example, the "male" and "female" schedules effective November 2, 1964, provide the following sampling of maximum rates paid for the jobs evaluated under the SJ&H Plan as indicated.

Additional Stipulations of Facts.

Jobs Evaluated	*Points*	*"Female" schedule*	*"Male" schedule*	*Differential*
Up to	160	$2.03	$2.185	15½¢
165-	235	-	2.235	
	235	2.07	2.235	16½¢
	615	2.45	2.805	35½¢
400-	440	-	2.45	
605-	630	-	2.805	

P-64 Since prior to June 11, 1964, the job of Inspector Cap Pack has been performed only by women on a rotating shift basis. The women performing this job on a rotating basis have been paid the same base hourly rate regardless of shift. The job of Inspector Cap Pack Nights was last performed on a steady night shift, on December 2, 1963, and when it was performed the base hourly rate was higher than that being paid for the job of Inspector Cap Pack. The job descriptions for both were the same and the point evaluations the same under the SJ&H Plan. Only men performed the job of Inspector Cap Pack Nights. Men working on the steady night shift inspection jobs performed additional duties requiring greater effort than the day shift inspection jobs, but these jobs were neither described nor evaluated under the SJ&H Plan since that Plan did not take effort into account.

P-65 Since prior to June 11, 1964, the job of Ceramic Machine Loader has been performed only by women on all three shifts, on a rotating shift basis. The job of Ceramic Machine Loader Nights has not been manned since October 17, 1960. The women performing this job on a rotating basis are paid the same base hourly rate regardless of shift. When the job of Ceramic Machine Loader Nights

was manned it paid a higher base hourly rate than the job of Ceramic Machine Loader. The job descriptions for both and the point evaluations were the same. Only men were assigned to perform the job of Ceramic Machine Loader Nights. The SJ&H Plan did not evaluate either manual or visual effort or give weight to the time of day worked.

P-66 Since prior to June 11, 1964, the job of Silver and Lacquer Machine Loader has been performed by women on a rotating shift basis. The women are paid the same base hourly rate regardless of shift. The job of Silver and Lacquer Machine Operator Nights was last performed on the steady night shift on December 2, 1963, and when performed it paid a higher base hourly rate than the job of Silver and Lacquer Machine Operator. The job descriptions for both and the point evaluations were the same under the SJ&H Plan. Only men were assigned to perform the job of Silver and Lacquer Machine Loader Nights.

P-122 Under the SJ&H Plan job descriptions were supposed to be kept up to date. It was not done at regular periods.

P-170 From June 11, 1964, to January 18, 1965, the SJ&H job description for a Hiker was as follows:

"*PRIMARY FUNCTION:*

Under the supervision of Shift Foreman Packing and Frosting, performs a wide variety of jobs — e.g., making hampers, sealing, transporting ware, etc.

EQUIPMENT USED:

Hand truck, tape sealing machine, scales, skids, conveyor, wings, hand stamp, forming stand.

MATERIAL USED:

Hampers, tape, bulbs, twine, formica plows, warehouse delivery slip, glue, letters and numbers, water, and broom.

WORK PERFORMED:

Typical examples of work performed as assigned by superior:

1. Assembles hampers, tapes bottom flaps, inserts packing materials required, and places on overhead conveyors. Removes excess tape from hampers and discards old or unusable hampers.
2. Sets up type for taping machine, indicating such information as: ware type, pieces per hamper, shift, date and hour.
3. Tapes flaps of filled hampers, carries and places on skids; ties top layer of hamper with twine, attaches warehouse delivery slip, and transports loaded skid — using hand lift truck — to assigned area. (End of shift, departmental copy of warehouse delivery slip given to Foreman.)
4. Weighs hamper load if bulbs are on scales, removing or adding bulbs, adjusting to weight requirement.
5. Remove empty trays from conveyor (frosting area) places on hand truck, and transports to designated area.
6. Cleans or prepares working area, positioning tables, roller conveyors, sweeps floor, etc., as directed.

7. Performs miscellaneous jobs — e.g., minor adjustment to taping machine, adjusting wings on conveyor belts, etc., as directed.

8. Removes cullet cans from packing and capping area.

9. Keeps machine loaders supplied with ware."

Stipulation P-58

is objected to on the grounds that it is not relevant or material to the subject matter of Plaintiff's cause of action; it involves statements which are conclusions and/or opinions as to law and/or fact; finally, it involves hearsay evidence.

• • • •

P-58 Perry Seamans, the Wellsboro plant industrial engineer from 1951 to 1956, and from 1961 to present, testified that he did not know why the steady night shift employees performing these inspection jobs have been paid a higher rate than the employees performing these jobs on the day shifts except that the practice is a tradition.

Stipulation P-72

is objected to on the grounds that it is basically repetitious of matter covered in Paragraphs 8 and 9 of "5.1 Stipulation of Facts", and any non-repetitious material is not relevant or material to the subject matter of Plaintiff's cause of action.

• • • •

P-72 Prior to October 16, 1966, only men worked on the steady night shift. In several instances the job titles were the same except the designation "Nights" was added to the

steady night shift job. These jobs were Inspector-Packer, Positioner-Inspector, Frost Light Inspector, Quality Inspector, Quality Control Inspector, Inspector-Capper-Packer, Ceramic Machine Loader, Silver and Lacquer Machine Loader, and All Around Cafeteria Worker.

NO OBJECTIONS ARE MADE TO THE ADMISSIBILITY OF P-35, P-38, P-39, P-40, P-41, P-42, P-43, P-44, P-45, P-46, P-47, P-57, P-59, P-60, P-63, P-68, P-69, P-70, P-71, P-83, P-107, P-108, P-109, P-110, P-111, P-112, P-113, P-117, P-119.1, P-119.2, P-141, P-142, P-160 ALL OF WHICH HAD BEEN FORMERLY OBJECTED TO ON THE BASIS OF RELEVANCE AND MATERIALITY

P-35 The term "supplemental escalating shift differential" was originated for use in a situation involving litigation under the equal pay provisions of the Fair Labor Standards Act at Defendant's Corning, New York, plant to describe the higher base hourly rate paid to night shift inspectors.

P-38 Since October 20, 1947, Defendant has, at different times, had two job evaluation plans.

P-39 The first job evaluation plan was effective from October 20, 1947, to January 18, 1965, and was called the Stevenson, Jordan and Harrison Plan. It is referred to as the SJ&H Plan. The second and present one was installed on January 20, 1969, and is called the Corning Glass Works Plan and referred to as the CGW Plan.

P-40 Since 1951 the Wellsboro plant has had its own industrial engineer who is concerned with job evaluation, among other duties.

Additional Stipulations of Facts.

P-41 The purpose of job evaluation is to arrive at the proper rates for each job in relation to other jobs.

P-42 Job descriptions are written by job analysts. The work normally performed on a regular basis is supposed to be covered. Also covered are duties which require special skills but are performed only occasionally.

P-43 Duties that are unrelated to the primary job and are performed as a special assignment or a substitute for another employee, or because of an unusual temporary situation, are not included in the description.

P-44 The job description does not limit the foreman in making other work assignments to those in his department. The Company's regular procedure is supposed to be used to determine if the employee's rate of pay should be altered during this period.

P-45 For writing the job description, the foremen are the source of the original information. Duties are also discussed with the employees who are performing the job. The jobs are actually observed. Sometimes the union representative is consulted. After the job description is written it is taken to the foremen and union representative to check on whether the job has been properly described. The jobs are checked from time-to-time to ascertain whether changes need to be made in the description and evaluation.

P-46 Each job evaluation is submitted to a committee consisting of three union representatives which discusses them with the personnel director and the industrial engineer.

Additional Stipulations of Facts.

P-47 It is the responsibility of the foreman to inform the plant industrial engineer and his assistants if any changes take place in the work regularly performed. This responsibility is shared with the union committee.

P-57 Time of day worked has never been considered a factor in Defendant's job evaluation plans.

P-59 The first formal rate schedules for the Wellsboro plant were made effective October 20, 1947.

P-60 From October 20, 1947, to January 17, 1965, there was a practice or custom of maintaining "male" and "female" schedules for rate ranges and steps. Men and women were grouped on the "male" and "female" rate schedules according to wage group numbers and job evaluation points.

P-63 There were 13 jobs paid on the basis of the "female" rate schedule. The highest-rated one is Quality Inspector. Eight of these job titles appear on the "male rate schedule" with the designation "Night" after them. These jobs are Positioner-Inspector, Inspector-Packer, Inspector Cap Pack, Silver and Lacquer Machine Loader, Ceramic Machine Loader, Frost Light Inspector, All Around Cafeteria Workers and Quality Inspector.

P-68 Except for the "male" and "female" rate schedules effective November 19, 1962, the "male" and "female" rate schedules at the main plant in Corning, New York, and introduced into evidence in Plaintiff's Exhibits 59-66 and 68E-68Z in ***Shultz v. Corning Glass Works,*** WD N.Y., Civil No. 1967-29, are the same rate schedules in effect at Wellsboro.

Additional Stipulations of Facts.

P-69 "Male" and "female" rate schedules were eliminated as of January 18, 1965.

P-70 In converting the "male" and "female" rate schedules to one combined schedule the maximum rates for some jobs did not change, but, with respect to those jobs, some of the subordinate rates changed slightly. For example, the job of Inspector-Packer on the "female" rate schedule had been in wage group 5 at a maximum rate of $2.09 and it went into wage group 1 on the combined schedule at the same $2.09 maximum rate. The job of Inspector-Packer Nights on the "male" rate schedule had been in wage group 3 at a maximum rate of $2.34 and went into wage group 5 on the combined schedule at the same $2.34 maximum rate.

P-71 Until October 16, 1966, Defendant maintained separate "male" and "female" seniority lists.

P-83 In the event of a force reduction, generally speaking, plant seniority controls. Under the system of job entitlement an employee has no rights to a job for the first 84 days. Therefore, if there is a force reduction in a job, employees on the job for less than 84 days go first from that job on the basis of plant seniority.

P-107 All employees in all job classifications are available to perform other jobs having different work requirements.

P-108 Generally the female employees who have performed and are performing the job of Inspector-Packer since October 2, 1966, have been and are available for and at times have been assigned to other jobs involving a great

variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than the job of Inspector-Packer.

P-109 Generally the female employees who have performed and are performing the job of Positioner-Inspector since October 2, 1966, have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than the job of Positioner-Inspector.

P-110 Generally the female employees who have performed and are performing the job of Frost Light Inspector since October 2, 1966, have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than the job of Frost Light Inspector.

P-111 Generally the female employees who have performed and are performing the job of Quality Inspector since October 2, 1966, have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skills, and responsibility and are performed under different working conditions than the job of Quality Control and Quality Inspector.

P-112 On the day shifts male inspectors who are called upon to perform the job of Hiker carry a multiple rate and receive the rate for the job of Hiker when performing the

job of Hiker. This is also true of any male inspectors on the night shift with seniority after January 20, 1969. It is not true of male inspectors on the night shift hired prior to January 20, 1969, who continue to receive their inspection rate even when performing the additional duties described in paragraphs 34, 35, 41, 45d, and 46.

P-113 Multiple rates are paid to employees when it is anticipated that the employee will move periodically back and forth between two or more job classifications.

P-117 During the workweek which included June 11, 1964, there were 21 Inspector-Packers Nights on the night shift, all of whom were men, and 40 Inspector-Packers on the two day shifts, all of whom were women.

P-119.1 Employees with multiple rates receive the rate for the job they are actually scheduled to perform for a particular day unless they are assigned to a higher-rated job.

P-119.2 An employee carrying a multiple rate, if temporarily assigned to a lower-rated job than the job for which the employee is scheduled for a particular day, is paid at the rate for the higher-paid job.

P-141 During the workweek including June 11, 1964, there were 7 Frost Light Inspectors on the day shifts all of whom were women.

P-142 During the workweek which included June 11, 1964, there were 5 Frost Light Inspectors on the night shift, all of whom were men.

P-160 During the workweek which included June 11, 1964, there were 5 Quality Inspector Nights on the night shift, all of whom were men, and 15 Quality Inspectors on the day shifts, all of whom were women.

Respectfully submitted,

/s/ SCOTT F. ZIMMERMAN
/s/ WALTER P. DEFOREST
REED, SMITH, SHAW & McCLAY

Counsel for Defendant, Corning Glass Works.

December 10, 1971

[Filed, January 11, 1972]

TRANSCRIPT OF PROCEEDINGS, OCTOBER 18, 1971.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

Lewisburg, Pennsylvania, October 18, 1971.

Before: Honorable Malcolm Muir.

Appearances:

For the Plaintiff: Isabelle R. Cappello, Esq., 609-6th Place, S. W., Washington, D. C.

Stephen K. Ernst, Esq., 1505 Jefferson Building, 1015 Chestnut Street, Philadelphia, Pennsylvania 19107.

For the Defendant: Scott F. Zimmerman, Esq., 747 Union Trust Building, P. O. Box 2009, Pittsburgh, Pennsylvania 15230.

John G. Wayman, Esq.

Walter P. DeForest, Esq.

Robert F. Cox, Cox, Wilcox, Owlett & Lewis, 19 Central Ave., Wellsboro, Pa. 16901.

• • •

[I-68] The Court: All right. Thank you.

I would like to look now at the plaintiff's trial brief, page 2, second full paragraph, last sentence. Where is there authority for that proposition?

Mrs. Cappello: The last full paragraph?

The Court: There are two full paragraphs on that page, the last sentence. "It is the Secretary's position that compliance as to women after October 16 does not achieve the statutory aim of correcting discriminatory wage practices as to all workers and that Corning's violations took on

another aspect when after October 16, 1966 it assigned men to perform the traditionally female job at the lower base salary rate."

What is the authority for that in the Act, or outside the Act?

Mrs. Cappello: The express proviso against reducing rates, your Honor—

The Court: Let me stop you right there. Where is there a reduction of rate as to a woman?

Mrs. Cappello: As to a woman, your Honor?

The Court: Yes as a woman if she went to a higher rate?

[I-69] Mrs. Cappello: Well not to the ones that went to the higher rate, but on October 15, 1966 all the women were entitled to the higher rate, your Honor, under the Act. Then when defendant opened up the jobs on the night shift to the women on October 16, it couldn't reduce the rates of all the women who didn't go on the night shift. They had all become entitled to the higher rate under the Act. And you then can't reduce the rates and just say, well just you women who go up on the night shift are going to get the higher rate. They were already entitled to the higher rate, base salary rate, all of them.

The Court: But no woman who stayed on the day rate in fact got a reduction? She didn't get what she said she was entitled to but she never got a reduction.

Mrs. Cappello: The statute said she's got to be raised.

The Court: I understand. But she didn't get raised?

Mrs. Cappello: No, but she should have been raised.

The Court: I understand that.

Mrs. Cappello: Therefore she has to be at that higher rate under the statute, and therefore on October 16, 1966 you cannot go in and reduce her rate. She is already

[I-70] entitled to the higher rate because she was performing equal work with the men on the night shift.

The Court: Well, I understand your position there, but in fact she never did get a reduction in any dollars, did she?

Mrs. Cappello: In effect she would have gotten a reduction if you accept Corning's position, your Honor; because if you accept their position—if you agree with us that they were violating the Act up to October 16, 1966, and therefore they were all entitled to the higher rate, if you then adopt defendant's position that they came into compliance on October 16, the women are going to have their rate reduced on the day and afternoon shift.

• • •

TRANSCRIPT OF PROCEEDINGS, OCTOBER 19, 1971.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

Lewisburg, Penna.
October 19, 1971.

Before: Honorable Malcolm Muir.

Appearances:

For the Plaintiff: Isabelle R. Cappello, Esquire, 609 6th Place, S. W., Washington, D. C., and Stephen K. Ernst, Esquire, 1505 Jefferson Building, 1015 Chestnut Street, Philadelphia, Penna. 19107.

For the Defendant: Scott F. Zimmerman, Esquire, 747 Union Trust Bldg., P. O. Box 2009, Pittsburgh, Penna. 15230.

John G. Wayman, Esquire.

Walter P. DeForest, Esquire.

Robert F. Cox, Cox, Wilcox, Owlett & Lewis, 19 Central Ave., Wellsboro, Pa. 16901.

• • •

[II-35] RE-CROSS EXAMINATION by Mr. Zimmerman:

Q. Did the S J & H Plan include among the factors evaluated the time of day worked. In other words, the fact that a job was performed on the steady night shift? A. The evaluation?

Q. Yes. A. No.

Q. Or under the S J & H Plan? [II-36] A. No.

Q. Or under the CGW Plan? A. No.

• • •

TRANSCRIPT OF PROCEEDINGS, OCTOBER 20, 1971.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

Lewisburg, Penna.
October 20, 1971

Before: Honorable Malcolm Muir.

Appearances:

Isabelle R. Cappello, Esquire, 609 6th Place, S. W. Washington, D. C., and Stephen K. Ernst, Esquire, 1505 Jefferson Building, 1015 Chestnut Street, Philadelphia, Penna. 19107.

For the Defendant: Scott E. Zimmerman, Esquire, 747 Union Trust Building, P. O. Box 2009, Pittsburgh, Penna. 15230.

John G. Wayman, Esquire.

Walter P. DeForest, Esquire.

Robert F. Cox, Cox, Wilcox, Owlett & Lewis, 19 Central Ave., Wellsboro, Pa. 16901.

• • •

[III-196] Mr. Zimmerman: I will call Dr. Paul Lehoczky.

DR. PAUL N. LEHOCZKY, a witness called, being duly sworn, testified as follows:

Direct Examination:

Mrs. Cappello: May we have Mr. Zimmerman state the purpose for the testimony?

The Court: Yes.

Did you hear what Mrs. Cappello asked?

Mr. Zimmerman: She asked me to make an offer of proof I believe, Your Honor.

The Court: Yes.

Mr. Zimmerman: Your Honor, I offer to prove through Dr. Lehoczky that working on the steady night shift [III-197] is working under substantially different working conditions than working on day shift and prove the basis for his opinion in that respect.

Mrs. Cappello: We cannot stipulate that.

The Court: All right.

Mr. Zimmerman: Your Honor, I assume that the stipulation which we have entered into with respect to the qualifications of the witness, of this witness obviate the need of going into that in detail with him.

The Court: I was not aware that the Government had stipulated to—

Mrs. Cappello: We didn't, Your Honor, but Mr. Lehoczky testified in the Corning Glass Works New York trial and we were satisfied that he is competent in the field of job evaluation and I certainly would not dispute his qualifications there. I am not sure—I suppose since working conditions is a part of the

job evaluation program we would not challenge his credentials.

The Court: All right.

Mr. Zimmerman: I would like to make an offer of qualifications in the event that Plaintiff is unable to stipulate to this offer I will then put it in through the witness.

The Court: All right.

[III-198] Mr. Zimmerman: Dr. Lehoczky is an Emeritus Professor in Industrial Engineering at Ohio State University. He has been with Ohio State University since 1928 in various teaching capacities and for twenty years was Chairman of the Department of Industrial Engineering.

His teaching experience at Ohio State was concentrated in work measurement including incentives in job evaluation and time studies. He is also a Registered Professional Engineer in Ohio and a Professional Labor Management Dispute Arbitrator.

During World War II the National War Labor Board, Fifth Region, used Dr. Lehoczky as their panel chairman in over fifty cases and as a technical expert to evaluate certain requests by industry and labor to find out whether or not the Government's hold-the-line order should be vacated in certain instances.

Later on Dr. Lehoczky served for several years as a Commissioner of Conciliation for the United States Conciliation Service for technical matters. He has also arbitrated labor management disputes, over four thousand of these in the last twenty-five or

thirty years. Most of these are technical job evaluation matters.

Dr. Lehoczky was also a member of the Three-Man Taft Hartley Board appointed by President Eisenhower to [III-199] investigate the 1959-1960 steel strike.

Mrs. Cappello: I didn't quarrel with his qualifications.

Mr. Zimmerman: I assume then that we have a stipulation on that question?

Mrs. Cappello: I thought I said that.

DIRECT EXAMINATION by Mr. Zimmerman:

Q. Dr. Lehoczky, in your professional opinion as an Industrial Engineer and as a Labor Management Dispute Arbitrator for more than twenty-seven years, is working on a steady night shift working under a substantially different condition than rotating day shifts? A. It is.

Q. Will you please state the basis for your opinion? A. The opinion is based on both sociological and physiological data. First of all from the sociological point of view the Federal Government recognized this during World War II when they were willing to set aside the executive order, which we call the hold the line order, signed by the President, on wages and permitted the addition of certain number of cents to the regular wage as a shift differential.

From the sociological point of view, of course, it was understood that an employee who had to work at night [III-200] became out of phase with his family, his normal family life and also, of course, with the community life that a day shift worker enjoys.

And as far as the physiological aspects are concerned, experts in the field of physiology and biology and medicine have confirmed what night shift workers have known for a long, long time, namely that night work interferes with the employee's life rhythms, generally referred to as circadian rhythms, in this particular area.

The Court: What is the word?
The Witness: Circadian.

DIRECT EXAMINATION by Mr. Zimmerman:

A. And the physiologist and so on use this term for the analysis of the data that they have got.

Now, in that connection then, the various companies and unions have negotiated from time to time the shift differentials.

We have heard that Corning has a shift differential of sixteen cents here. U. S. Steel has fifteen cents. Westinghouse has a ten percent shift differential, and so on. It depends on the relationship of the Union and the company and to a large degree who is negotiating and how much else they had to negotiate about.

[III-201] However, in the days before Unions were commonly accepted in industry, before the Industrial Union was here, this negotiation took place between the company and the individuals.

Q. The individual workers? A. Individual employees. And it usually resulted from a request by the company to the employee to work at night and he would do so under certain conditions. And since the conditions varied we have a variable number of night shift bonuses which later on were unitized by the unions.

However, our night differential harks back to the time when the employer had to pay more to the employee or he would not work at night.

There are also exceptions to the people who—we had one here this morning, Mr. McCarthy, who is willing enough to work at night because he is, well possibly not suffering as much as the average employee in his physiological and social activities.

Mr. Zimmerman: Thank you, Dr. Lehoczky. I have no further questions, Your Honor.

The Court: Cross examination.

CROSS EXAMINATION by Mrs. Cappello:

Q. Doctor, you did give testimony in the case of [III-202] Schultz vs. Corning Glass Works in the Western District of New York, didn't you? A. Yes on job evaluation.

Q. Do you have experience in the field of job evaluation? A. Yes.

Q. And are you familiar with the Corning Glass Works job evaluation plan? A. Yes I am.

Mr. Zimmerman: Your Honor, I object to introducing evidence through this witness because we have not used him for that purpose and it is far outside the scope of the direct examination.

Mrs. Cappello: This has to do with working conditions under the Corning Glass Works job evaluation plan.

The Court: You are not talking about the Steven Jordon or the Harrison plan?

Mrs. Cappello: Both of them, Your Honor.

The Court: I would like the record to show that the Steven Jordon, Harrison plan is twenty-four years old today. It's of great interest to everybody.

Restate your objection. I am a little bit concerned about it.

Mr. Zimmerman: Your Honor, as I understand it, [III-203] Mrs. Cappello is intending to show this witness the job evaluation plan apparently for the purpose of establishing that under it the time of day is not included in the category of working conditions evaluated by the plan.

I will stipulate that this plan does not so provide. In any event I think it's irrelevant to this witness's professional opinion.

The Court: But if he stipulates to that will that solve your problem?

Mrs. Cappello: Well, no, Your Honor, I wish to explore with this witness in terms of job evaluation what is considered a working condition *vis-a-vis* a shift differential or a bonus as the Doctor has called it.

The Court: I will overrule the objection.

CROSS EXAMINATION by Mrs. Cappello:

Q. Doctor, I would like to show you Plaintiff's Exhibit 1, and Plaintiff's Exhibit K-1, there are two. Would you state what that is and state whether you are familiar with it? A. Exhibit K-1 represents section one of the Corning Glass Works job evaluation system and is known as the Evaluation Manual.

Q. Do you consider this a sound job evaluation plan? [III-204] A. I certainly do.

Q. Does industry generally evaluate jobs using the same factors as Corning Glass Works? A. Not necessarily exactly, but generally, yes.

Q. Would you indicate what working conditions are considered under the Corning Glass Works job evaluation plan? A. I would have to check through here.

Q. Please do. A. Working conditions are surroundings—well, the lowest degree talks about normal factory conditions, no unusual situations leading to discomfort. The next degree speaks of intermittent or continuous exposure to a few slightly disagreeable conditions.

The third states intermittent or continuous exposure to a few moderately disagreeable conditions and so on up to the fifth degree.

Q. What is meant by surroundings for purposes of working conditions under the Corning Glass Works job evaluation plan? A. The definition given here—and this is the official definition—"This factor measures the degree to which the physical conditions surrounding the job are disagreeable. Consideration is given to the nature and degree [III-205] of the unpleasant conditions and the amount of time the employee is exposed to these conditions during the working day."

Q. Is any other factor considered under working conditions? A. No. The second factor under working conditions is titled "Hazards" and you do wish me to read that?

Q. Yes, please do. A. "This factor is a measure of the hazards of the job to which the employee is regularly exposed. Consideration is given to the degree to which the unguarded hazard exists. The frequency of exposure to the hazards, the type of degree of possible injury."

Q. Is it your understanding then that Corning Glass Works does not include time of day as a working condition factor? A. Not in this job evaluation system.

Q. How do they compensate employees for working at different times of day? A. They compensate them by a shift differential, payment of a shift differential.

Q. Is that what you call a bonus? A. Well, it's called a night bonus and an afternoon bonus at times.

Q. Or a premium? [III-206] A. Or a premium. A shift premium. There are other premiums.

Q. Do you know whether many plants have such bonuses or premiums for working at undesirable times of day? A. Yes.

Q. Do you know of any plants that pays a shift differential and also pays a higher base hourly rate for one group of employees who work at night? A. There are such cases. I wouldn't be able to cite you a specific incident, but for example, in one of the plants the old arrangement existed, and this is prior to the Union's action—

Q. Which plant is this? A. As I recall it—and I don't want to be held to this—it's one of the Westinghouse plants, where the night molders received a dollar more per hour for working at night than the day molders. Now this is an old arrangement and it serves the purpose of illustrating that.

Q. Is that the only plant that you know of that does that? A. Well I would have to—off hand, yes. But I am sure there are others. They are the plants that set up the night differential before this War Labor Board edict permitted the use of a shift differential. And they are the [III-207] historical situation.

Q. Does anyone who goes on the night shift get that difference in base hourly rate? A. If he is a molder, yes, in the particular incident I cited.

Q. How about any other incidents? A. I don't know.

Q. Well in your experience as a job evaluator, do you find that working conditions, working at a different time of day is usually taken care of by a bonus and is not considered a working condition? A. It is considered a wage condition. A working condition is generally referred to in job evaluation as a surrounding and hazardous condition. However, that does not preclude its use in another aspect and that is the wage condition.

Q. It's a wage condition? A. Yes.

Q. Are you familiar with a Steven Jordon and Harrison job evaluation plan? A. Yes.

Mr. Zimmerman: Your Honor, I object to the introduction of Steven Jordon, Harrison job evaluation plan on the grounds that the plan itself is irrelvant and there [III-208] has been no showing that that was in effect at any time pertinent to this lawsuit.

The Court: Your comment?

Mrs. Cappello: Well we are introducing exhibits that show that it was replaced on January 20, 1969.

The Court: I thought there was a dispute about that?

Mrs. Cappello: Yes there is, but we have exhibits that are going in on that, Your Honor.

The Court: Is it your position that it did terminate on January 20 of 1969?

Mrs. Cappello: It was at that time replaced by the CGW plan.

The Court: Would the SJH have terminated on that date?

Mrs. Cappello: Well, we have exhibits and they are the Defendant's own records show that when they put in the CGW rates they lined up the column. The CGW rates and the SJ and H rates.

The Court: I am troubled by that point. I can't find out whether the Government said it did terminate on January 20 of 1969 or not.

Mrs. Cappello: Yes, Your Honor.

The Court: All right. What is the Company's [III-209] position on whether it terminated at that time?

Mr. Zimmerman: Your Honor, our position is that it terminated sometime in 1965. The exact date doesn't come to my mind but I will demonstrate that through a witness.

The Court: All right.

Mr. Zimmerman: In addition, Your Honor, may I add one further suggestion. As I did with the previous plan I will stipulate that the Steven Jordon-Harrison plan, if I have it correctly, does not include the time of day as a working condition in terms of the evaluation of jobs.

The Court: Is that stipulation satisfactory to you, Mrs. Cappello?

Mrs. Cappello: I would like the witness to testify to this SJ and H job evaluation plan and just what were the working conditions considered there under it.

The Court: Aren't you going to introduce some documents into evidence?

Mrs. Cappello: Yes, Your Honor.

The Court: Well don't the documents speak for themselves?

Mrs. Cappello: Well I wanted his opinion since he is an expert.

The Court: In the construction of it?

Mrs. Cappello: Whether he thinks this is a sound [III-210] job evaluation plan and whether the working conditions considered under this plan are considered sound job evaluations.

The Court: All right. Well, we are running for a very long time. I will overrule the objection and let you do it if you can do it with promptness because I must start this other matter at 4:30.

Mrs. Cappello: Yes, Your Honor.

CROSS EXAMINATION by Mrs. Cappello:

Q. This is Plaintiff's Exhibit 1, Exhibit J there too, which I handed you. What does the SJ and H plan provide as a working condition? A. It provides three major areas of working conditions. First of all surrounding conditions which are defined as wet, heat, cold, dust, grease, noise, and so forth. And then minor hazards which are described as bruises, cuts, heavy lifting, fumes, slippery floors, and so forth. And finally major hazards which are listed as machine, chemicals, gases, bodily injury, and so forth.

Q. In your experience with job evaluation are these sound factors to be considered under working conditions? A. These factors but they are not properly handled in the SJ and H system.

Q. In what way? [III-211] A. The entire SJ and H system was used and it was used for this purpose during

World War II, is so indefinite from factor to factor that you can interpret it anyway you like and you can slot a job much higher or much lower than it really should be. And this goes for working conditions.

Q. Do you know whether under that plan the rating factor is measured or multiplied by the common labor rate male and the common labor rate female? A. I am not certain of that. I believe it is but I would have to find it in here.

Mrs. Cappello: That's all, Your Honor.

The Court: Any re-direct, Mr. Zimmerman?

Mr. Zimmerman: Yes, your Honor.

RE-DIRECT EXAMINATION by Mr. Zimmerman:

Q. Dr. Lehoczky, you stated that working on a steady night shift was a wage condition. Does the fact that it is a wage condition mean that it is not also a working condition? A. No. It means that that particular element is not carried in a job evaluation system. In other words a job evaluation which deals with jobs only, with a job cycle and not with people, is insensitive to that particular factor.

Q. I see. A. Now there are other factors that go into wage [III-212] conditions as well. For example, working on Saturdays or working on Sundays, or working over time. Those are wage conditions that have nothing to do with job evaluation.

Q. Are those wage conditions working conditions in the same sense of the word, in your professional opinion, that working on a steady night shift is a working condition? A. Yes, they are wage conditions.

Q. Yes, but do they have the sociological and biological effects that you described? A. I don't know about the biological effects. They are limited largely to the night shift. But sociological effects are certainly there.

Q. In your professional opinion are the sociological effects connected with Saturday work, for example, as comparable to the sociological effects of an employee employed on a steady night shift? A. I can't answer that because I don't know any individual employee's position. If he has to go to a baseball game, yes. But if he just sits around at home, no. The night shift work is very serious.

Q. In other words Saturday happens once a week and steady night shift work happens five times a week? A. And it affects a lot more than an afternoon.

Q. Will you please make that same comparison with [III-213] respect to the biological or physiological differences, impact on a worker? A. The physiological differences are a function of the cycle, of the daily cycle, and they are the worst at night. We have statistics and we have charts and graphs that indicate that they are worse at night. They don't take a Saturday or Sunday into consideration.

Q. In other words it has a physical impact upon the well-being of many workers? A. Very much so.

• • •

TRANSCRIPT OF PROCEEDINGS, OCTOBER 21, 1971.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

Lewisburg, Pennsylvania, October 21, 1971

Before: Honorable Malcom Muir.

Appearances:

For the Plaintiff: Isabelle R. Cappello, Esq., 609—6th Place, S. W., Washington, D. C.

Stephen K. Ernst, Esq., 1505 Jefferson Building, 1015 Chestnut Street, Philadelphia, Pennsylvania 19107.

For the Defendant: Scott F. Zimmerman, Esq., 747 Union Trust Building, P. O. Box 2009, Pittsburgh, Pennsylvania 15230.

John G. Wayman, Esq.

Walter P. DeForest, Esq.

Robert F. Cox, Cox, Wilcox, Owlett & Lewis, 19 Central Ave., Wellsboro, Pa. 16901.

• • •

[IV-9] Mr. Ernst: Mr. Zimmerman, if you would make an offer of the names and what you would expect this witness to testify to, I think we can probably stipulate.

Mr. Zimmerman: Thank you.

Your Honor, I expect that this witness will testify that A. B. Fisher, a female, was employed on [IV-10] May 24, 1966 and accepted a job as an inspector-packer on the steady night shift on October 16, 1966.

Mr. Ernst: What was that last date?

Mr. Zimmerman: October 16, 1966.

Also that J. Y. Perry, a female, employed on June 13, 1966, accepted a job as an inspector-packer on the steady night shift on October 16, 1966; that E. F. Starkweather, a female, having a seniority date of June 14, 1966, accepted a job as an inspector-packer on the steady night shift on October 16, 1966; and that on this date — that is October 16, 1966 — any employee, male or female, employed at the Wellsboro Plant with a seniority date senior to the most junior of these employees could have had that job had they elected to accept it; that a J. A. Hopper, having a seniority date of March 14, 1967, accepted a job as inspector-packer on the steady night shift on March 14, 1966. She was hired directly into the job — I beg your pardon, it is 1967; and that two other females, A. A. Sherman, and G. L. Wallin were employed on the same day, March 14, 1967, and worked as inspector-packers on the steady night shift on that same day; and that any employee at that time employed at Corning Glass Works, Wellsboro Plant, could have had that job on that day had they elected to do so; and that N. M. Coolidge was employed on August 13, 1969 and accepted a job of [IV-11] inspector-packer on the steady night shift on August 13, 1969; and that any person employed at the Wellsboro Plant prior to that date could have had that job on August 13, 1969, had they elected to accept it.

This is with respect to the job of frost light inspector on the steady night shift, and I have two more employees.

Mr. Ernst: Shall we handle these, one position at a time?

Mr. Zimmerman: Sure.

Mrs. Cappello: Your Honor, we will stipulate to the names and the dates. We cannot stipulate to the conclusion because the inspector-packer job is not a bid job. It is not posted. I don't know how employees know about these vacancies. If senior employees were on vacation, they wouldn't have known about it, couldn't have bid on it when they got back the job would have been filled. They can't exercise their seniority unless there is a vacancy in the job. So we cannot stipulate to the conclusion, but we will stipulate to the names and the dates.

The Court: Is that satisfactory to you, sir?

Mr. Zimmerman: Yes, your Honor. I will question the witness on that other question.

The Court: All right.

[IV-12] Mr. Zimmerman: With respect to the job of frost light inspector, M. D-a-c-h-s-t-a-d-e-r, a male, having a seniority date of 9/20/66 accepted the job of frost light inspector on the steady night shift on June 10, 1967; and that a K. D. Leone accepted a job of quality inspector on the steady night shift on March 31, 1967.

Mrs. Cappello: Is that a male or a female?

Mr. Zimmerman: Male. The seniority date of Mr. Leone is May 9, 1966.

The Court: I thought it was L-e-o-n-e?

Mr. Zimmerman: Yes it is.

My understanding is that the area into which I must go with Mr. McKibbin now is limited to the question of what significance this is in terms of the rights of other employees.

The Court: You don't have a stipulation on this last one?

Mr. Ernst: I think perhaps we should stipulate as to the accuracy of the names and dates you have just indicated.

Mr. Zimmerman: Yes.

Mr. Ernst: We will stipulate.

Mr. Zimmerman: Thank you.

By Mr. Zimmerman:

[IV-13] Q. Mr. McKibbin, what is the significance of the fact that employees having these seniority dates, which have been indicated in the stipulation? A. The significance is that—

Q. Let me finish, that employees having the seniority dates of the employees indicated in the stipulation in terms of the ability of more senior employees to obtain these jobs on the date that the employees indicated in fact did obtain these jobs? A. The significance is that these employees took the jobs on the dates that I indicated, and that my investigation at the Plant indicates that these jobs are filled in either of two ways. I am speaking particularly now of the inspector-packer on the steady night shift.

Any employee who has any desire to go on that shift on that job indicates his wish or desire in the employment office, and at the time there is an opening, that employee is considered for that job. And the fact that these junior employees went on the job on the dates indicated would indicate that any senior employee who had wished to go onto the job and had availed themselves of the Plant practice could have gone on in place of these employees.

Mr. Zimmerman: Your Honor, as a matter of fact Mr. DeForest has just pointed out to me that there is a [IV-14] stipulation which I think may cover this question. I refer you to stipulation number 81 through 83.

The Court: All right.

By Mr. Zimmerman:

Q. With respect to a bid job, Mr. McKibbin, are the bids posted? What happens? How does an employee bid? A. At the time there is a vacancy on a bid job, there is notice posted in the Plant so that all employees are informed, and they then have an opportunity to complete a form, file a form, request a consideration for that job. And after the period for receiving bids is closed, then management makes the decision of which of the several employees who applied for the job will receive it.

Q. Is that decision based upon the Plant-wide seniority of the employee, everything else being equal? A. Yes, it is. It is all covered by the contract.

The Court: Mr. Zimmerman, does the stipulation state that the position of inspector-packer and positioner-inspector are bid jobs?

Mrs. Cappello: Eighty-three, your Honor.

The Court: But that just says the inspector-packer and hiker are non-bid.

Mr. Zimmerman: I was about to ask him that question.

[IV-15] The Court: When I read the stipulation, I was curious as to whether the other jobs which are not named there were in fact bid jobs, but there isn't any stipulation to that effect.

Mr. Zimmerman: Perhaps we might stipulate that the jobs frost light inspector and quality inspector are bid jobs.

Mr. Ernst: Yes, we will so stipulate.

The Court: All right.

By Mr. Zimmerman:

Q. You indicated with respect to those jobs which are non-bid jobs that a request is made to the personnel office. Is that in the form of a transfer request? A. Yes, sir.

Q. Will you please tell us on what occasions an employee may file a transfer request? A. Well, at any time in regard to a non-bid job, and it is customary to have a back log, if you will, of people who have indicated a desire—

Q. In other words is it customary for a vacancy to be required in a job before an employee may make known their desire through a transfer to be placed upon that job? A. That is not what normally happens.

Q. Ordinarily the employee files a transfer [IV-16] request indicating their desire? A. Yes, sir.

Q. And if a vacancy subsequently arises, the employee is placed upon the job in accordance with their request and seniority? A. Yes, sir.

Mr. Zimmerman: No further questions, your Honor.

The Court: You may cross examine.

CROSS EXAMINATION by Mrs. Cappello:

Q. Mr. McKibbin, how long are transfer requests kept on file? A. I think at the Wellsboro Plant they are kept on file for about three months.

• • •

PLAINTIFF'S EXHIBIT 1.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES, FIRST SET.

* * * *

Interrogatory No. 4

4. State the effective dates of the "male" rate schedules in effect after June 11, 1964, the rates for each wage group number, the job titles and numbers in each wage group number, and the number of job evaluation points assigned to each wage group as of said dates.

Answer

"Male" rate schedules in effect after June 11, 1964, were made effective: January 20, 1964, and November 2, 1964. The rates for each wage group number and the number of job evaluation points assigned to each wage group as of said dates are shown in Exhibits B1 and B2 attached. The job titles and (job code) numbers in each wage group as of November 2, 1964, are shown in Exhibit B3. The last "male" schedule ceased to be effective January 17, 1965. [Exhibit B2 is identical to Exhibit T-20 to Plaintiff's Exhibit 6, reproduced *infra*.]

Interrogatory No. 5

5. State the same information (requested in Interrogatory No. 4) with respect to the "female" rate schedules in effect after June 11, 1964.

Plaintiff's Exhibit 1.

Answer

"Female" rate schedules in effect after June 11, 1964, were made effective: January 20, 1964, and November 2, 1964. The rates for each wage group number and the number of job evaluation points assigned to each wage group number as of said dates are shown in Exhibits C1 and C2 attached. The job titles and (job code) numbers in each wage group number as of November 2, 1964, are shown in Exhibit C3. The last "female" schedule ceased to be effective January 17, 1965 [Exhibit C 2 is identical to Exhibit T-21 to Plaintiff's Exhibit 6, reproduced *infra*.]

• • • •

Interrogatory No. 26

26. State whether, in the past or presently, any of the jobs named in answer to No. 25 have been performed exclusively by men on all shifts and if so, identify the jobs by title and number and wage group number, and state whether the base hourly rate has been the same on all three shifts.

Answer

Yes, the following have been performed exclusively by men on all shifts, although since October 17, 1966, both men and women have had a right to the available work in accordance with their qualifications, seniority and preference:

Plaintiff's Exhibit 1.

Job Code	*Job Title*	*Group No.*
1836	Industrial Truck & Equipment Opr.	7
2015	Head Mixer	10
4007	Glass Melting Furnace Operator	11
4031	Optical Reader Forehearth & Lehr Oper.	14
2181	Cng. Rbn. Mch. Operator—Class B	14
2184	Relief Attendant	10
2280	Cng. Rbn. Mch. Operator—Class A	18
1053	Hiker	3
3838	Traying Machine Operator	5
4457	Frost Operator	8
4466	Misc. Frost Operator	9
3608	Opr. Cut & Finishing Machine	9
3716	Ceramic & S & L Operator	9
5711	Sahara Operator	9
5739	Finishing Equipment Mechanic	11
0850	Ind. Truck Driver & Checker	8
5728	Shift Maintenance Mechanic	13
6213	Electrician—Class A	16
6214	Electrician—Class B	12
5224	Packing Equipment Operator	7
5287	Attendant Hamper Maker & Sealer	4

The base hourly rate has been the same on all shifts.

• • • •

Interrogatory No. 32(a)

32. State the following information for the job of Inspector Packer No. 4561:

• • • •

Interrogatory No. 32(e)

32. (e) If this job has been described and evaluated under any job evaluation plan, state the name of the plan or plans, the factors considered under each plan, the names of the job analysts, the date the description or analysis was completed, the description, the evaluation originally

made in terms of the total points awarded as well as the individual points awarded for each factor considered under the plan, the date and nature of any revisions, and the name, address, and title of the custodian of the job descriptions and evaluations and the person who is best qualified to testify as to their use and preparation.

Answer

This job has been described and evaluated under the S J & H Job Evaluation Plan and also under the Corning Glass Works Job Evaluation Plan. As to the information requested with respect to the S J & H Plan see the copy of the S J & H Plan attached hereto as Exhibit J. The description of 2/7/49 reads as follows:

"PRIMARY FUNCTION:

Under the supervision of the Section Supervisor-Inspection Department visually inspects and packs a variety of bulbs.

EQUIPMENT USED:

Go, No-Go, gauges, micrometers, height gauges.

MATERIALS USED:

Packing materials

WORK PERFORMED:

Picks up clear, frosted, nonex or daylight bulbs passing on production belts or from reinspection belts in a prescribed manner (6-8 at a time) and visually inspects for glass quality and manufacturing defects such as stones, blisters, knots, cord, fire and water cracks, twisted necks and shoulders, dirty bulbs,

streaky and cloudy frosts, according to established specifications for individual types.

Places the bulbs for frosting in holes in the frosting tray after visual inspection, working at the speed of the conveyor belts.

Loose, strip or cell pack bulbs in hampers, positioning alternately on end or lying down in layers, inserting proper inner packing material as specified and transfer to conveyor when full.

Inspects clear or frosted bulbs, in reinspection room or on production run, depending upon immediate production requirements.

Insert inspection or packing ticket in each hamper of bulbs packed.

Performs miscellaneous gauging of bulbs by plug, go and no-go gauges, and breaking and micrometer gauging of certain special bulb types as required by supervisor.

Records information obtained from gauging for the use of Quality Control Inspector who compiles necessary information for rejection and holding of ware for reconditioning.

Maintains good housekeeping in working area."

As to the information requested with respect to the Corning Glass Works Job Evaluation Plan, see the copy of the Corning Glass Works Job Evaluation Plan attached hereto as Exhibit K1 and K2. The description of 1/8/70 reads as follows:

"*DESCRIPTION* packs bulbs or ornaments for shipment or for in-process storage. This work includes such duties as:

Plaintiff's Exhibit 1.

Moves empty carton from conveyor to packing stand, opens and inserts internal packing as required, closes full hamper and slides on lifts to take away conveyor.

Picks up 6 to 8 bulbs or ornaments at a time by grasping 3 or 4 between the fingers of each hand and bulk, tier, tray, or cell packs in hampers. Works rapidly, paced by the conveyor belt. When tier packing, alternates the bulbs up and down in rows. When tray packing, distributes the ornaments in one motion across the tray so that the neck of each ornament falls into proper position.

Uses hand fork to pick up bulbs from belt or from frost trays and bulk packs in hamper or in tote box.

Observes bulbs on belt and as handled and discards any bulb with obvious defects such as broken, cracked flare, twisted neck, etc.

Attends mechanical bulk packer, opening hamper and moving it to loading position, operating lever to start and stop flow of bulbs, placing paddle to break fall of first bulbs in each hamper, leveling bulbs in hamper, and moving hamper from loading position when full.

Maintains good housekeeping in work area."

• • • •

Interrogatory No. 33

33. State the same information as requested in No. 32, *supra*, as to the job of Positioner Inspector No. 4560.

• • • •

Plaintiff's Exhibit 1.

33(e) — This job has been described and evaluated under the S J & H Job Evaluation Plan and also under the Corning Glass Works Job Evaluation Plan. As to the information requested with respect to the S J & H Plan see the copy of the S J & H Plan attached hereto as Exhibit J. The description of 4/27/48 reads as follows:

"PRIMARY FUNCTION:

Under the supervision of Section Supervisor, works in rotation between the positioning of bulbs in lanes between belts of traying machine, and the visual inspection of bulbs for specified periods during each shift.

EQUIPMENT USED:

Wooden mallet, trays, gloves, safety goggles.

MATERIAL USED:

Packing material.

WORK PERFORMED:

Positions bulbs in lanes of moving belts of traying machine making sure that the bulbs are properly distributed over all ten lanes of the conveyor. Throws into cullet hopper broken, mis-shapen and other obviously defective bulbs. Inspects for such visual defects as twisted necks, broken bulbs, and other obvious manufacturing defects in the flare and neck of the bulbs.

Performs the duties of an Inspector-Packer when traying machine is not operating. Maintains good housekeeping conditions in working area.

The above statement reflects the general details considered necessary to describe the principal functions of the job identified and shall not be construed as a detailed description of all of the work requirements that may be inherent in the job."

As to the information requested with respect to the Corning Glass Works Job Evaluation Plan see the copy of the Corning Glass Works Job Evaluation Plan attached hereto as Exhibits K1 and K2. The description of 3/10/69 reads as follows:

"*DESCRIPTION* Positions bulbs in runs of traying machine. Performs duties such as:

Picks up and positions bulbs which have failed to drop properly into the trayer lanes. Transfers bulbs from one lane to another as required so that an adequate supply is always available in each lane.

Discards obviously defective bulbs such as broken or cracked flares.

Maintains good housekeeping in work area."

• • • •

Interrogatory No. 37

37. State the same information as is requested in No. 32, *supra,* as to the job of Frost Light Inspector No. 4674.

• • • •

37(e) — This job has been described and evaluated under the S J & H Job Evaluation Plan and also under the Corning Glass Works Job Evaluation Plan. As to the information requested with respect to the S J & H Plan see the copy of the S J & H Plan attached hereto as Exhibit J. The description of 9/13/55 reads as follows:

Plaintiff's Exhibit 1.

"PRIMARY FUNCTION:

Under supervision of Frost Shift Foreman — Inspection, Finishing and Packing, maintains an even flow of trays along run, visually inspects for glass quality and frosting defects and removes all defective ware from trays.

EQUIPMENT AND TOOLS:

Trays, tray racks, long handled mallet, inspection lights, tray drive chain control switch, gloves.

MATERIAL USED:

None.

WORK PERFORMED:

The Frost Light Inspector normally works in one of two positions and alternates between these positions while performing the following functions:

1. Knock Out Position.

   Inspects flare side of trayed ware as it passes over inspection lights. (6-13 trays per minute, 100 bulbs per tray.) Uses long handled mallet to knock defective ware out of tray.

2. Frost Light Position.

   Pins in wet trays—or damaged
   Inspects tops of trayed ware held over inspection light. (6-13 trays per minute, 100 bulbs per tray.) Throws out all broken or defective ware. Maintains even flow of trays to packers by operating tray drive chain control switch and by racking trays of ware when line is full. Dumps complete

trays of ware when Quality Control Inspector signifies that ware is unsatisfactory for packing. Sets out up to 100 trays (in 8 to 16 minutes) of ware which has frost defects which can be corrected by refrosting.

While performing the above functions, the Frost Light Inspector has the following responsibilities:

1. Removes all bulbs containing unacceptable frost defects. Exercises judgment and discretion in either dumping or accepting minor frost defects.
2. Notifies Frost Operator of frost defects.
3. Removes all bulbs containing unsatisfactory glass defects, such as cracked flares, blisters, seeds, severe mold rings, twisted necks, etc.
4. Notifies Quality Control Inspector of all types of defects found.
5. Passes on acceptability of ware in absence of Quality Control Inspector. Records hour and defect of questionable ware for Quality Control Inspector's review. Notifies Frost Foreman or Shift Foreman of such defects."

As to the information requested with respect to the Corning Glass Works Job Evaluation Plan see the copy of the Corning Glass Works Job Evaluation Plan attached hereto as Exhibits K1 and K2. The description of 3/7/69 reads as follows:

"*DESCRIPTION* Inspects frosted ware for glass quality and frosting defects and for broken and cracked flares. Alternates between two positions performing duties such as.

Plaintiff's Exhibit 1.

Inspects top of trayed ware held over inspection light. Removes all bulbs containing unsatisfactory visual defects such as frost spots or streak, splashed bulbs, clear spots, cracked flares, twisted necks, blisters, seeds, severe mold rings, etc. When majority of ware is bad, dumps whole tray. Also dumps trays when Quality Inspector signifies that ware is unsatisfactory for packing. Sets out trays when defects are such that they can be corrected by refrosting.

Inspects flare side of trayed ware (bottom side) as trays pass over inspection light. With long-handled mallet knocks out bulbs which are broken or have cracked flares.

Maintains proper flow of trays to packing position by operating tray drive chain switch or by setting out trays as necessary. Places automatic ejector pins in splashed or damaged trays. Wipes oil and grease from top of trays to protect bulbs as required.

Sets out trays rapidly to prevent jamming when take away chain, bulk packer, or tray tower fails.

Maintains good housekeeping in work area."

• • • •

Exhibit B1 to Plaintiff's Exhibit 1.
[Responsive to Interrogatory No. 4]

MALE SCHEDULE FOR DERIVING RATE RANGES AND STEPS

Cancels Sheet Effective 11/19/62
Effective January 20, 1964

Wage Group No.	*Job Eval. Points*	*Trainee Hourly Starting Rate*	*Min. of Rate Range*				*Max. of Rate Range*
					Midpt.		
1	Up to 160	$2.02	$	$	$	$2.065	$2.115
2	165-235	2.02			2.065	2.115	2.165
3	240-295	2.02		2.065	2.115	2.165	2.215
4	300-350	2.02	2.065	2.115	2.165	2.215	2.265
5	355-395	2.02	2.115	2.165	2.215	2.265	2.315
6	400-440	2.02	2.165	2.215	2.265	2.315	2.375
7	445-485	2.065	2.215	2.265	2.315	2.375	2.43
8	490-535	2.115	2.265	2.315	2.375	2.43	2.505
9	540-570	2.165	2.315	2.375	2.43	2.505	2.57
10	575-600	2.215	2.375	2.43	2.505	2.57	2.655
11	605-630	2.265	2.43	2.505	2.57	2.655	2.715
12	635-660	2.315	2.505	2.57	2.655	2.715	2.785
13	665-685	2.375	2.57	2.655	2.715	2.785	2.865
14	690-710	2.43	2.655	2.715	2.785	2.865	2.94
15	715-730	2.505	2.715	2.785	2.865	2.94	3.01
16	735-755	2.57	2.785	2.865	2.94	3.01	3.095
17	760-775	2.655	2.865	2.94	3.01	3.095	3.19
18	780-795	2.715	2.94	3.01	3.095	3.19	3.28
19	800-810	2.785	3.01	3.095	3.19	3.28	3.365
20	815-825	2.865	3.095	3.19	3.28	3.365	3.465
21	830-845	2.94	3.19	3.28	3.365	3.465	3.565
22	850-860	3.01	3.28	3.365	3.465	3.565	3.67
23	865-875	3.095	3.365	3.465	3.565	3.67	3.775
24	880-890	3.19	3.465	3.565	3.67	3.775	3.89
25	895-905	3.28	3.565	3.67	3.775	3.89	4.005
26	910-920	3.365	3.67	3.775	3.89	4.005	4.125

To: Mailing List No. 2—Hourly Rate Procedure dated 12/20/63

From: Employe Services
Industrial Relations Division

By: E. B. Lewis 1/31/64

Exhibit B3 to Plaintiff's Exhibit 1.
[Responsive to Interrogatory No. 4]

WELLSBORO JOBS

Wage Gp. No.	Job Code	Title
1	1217	Sweeper & Cleaner
2	970	Overhd. Mach. Cleaner
2	1042	Utility Worker
2	1053	Hiker
2	1055	Hiker
2	1055	Hiker
2	1056	Hiker
2	1115	Cullet Labor
2	1409	Laborer
2	1609	Shipping Labor
3	1064	Sweeper,Mach.,Clean, Paint
3	1346	Positioner Inspector—Nights
3	1347	Insp. & Pack—Nights
3	1348	Insp. Cap Pack—Nights
3	1815	Ind. Trk. Drvr.
3	1819	Oper. Power Sweep.
3	1901	Fire Equipt. Insp. (MRO)
3	3748	Ceramic Machine Loader—Nights
3	3749	S & L Machine Loader—Nights
4	1104	Attendant—Hamper Maker and Sealer
4	3011	Mixer
4	3807	Oper. Cut & Cap Mach.
4	4526	Packing Line Attendant
4	4679	Frost Line Inspector—Nights
4	5685	Cutter—Grinder Oper.
4	5854	Ind. Trk. Dr. Hvy. Eq. Mov. (MRO)
4	6000	Water Trtmnt. Oper.
4	6560	Storeroom Attendant
4	6857	All Around Cafeteria Wkr.—Nights
5	3122	Tray Mach. Oper.
5	3571	Silver Mixer
5	5235	Ind. Trk. Drvr. & Chkr.
5	5402	Elec. Trk. & Equipt. Oper.
5	5621	Insp. Mold Coat
5	5734	Supply & Maint. Man
5	5761	Mold Coater
6	3010	Head Mixer
6	3567	Frost Oper.
6	3574	Ceramic & S&L Oper
6	4855	Quality Insp.—Nights
6	5510	Dump Trk. Driver (MRO)
6	5725	Oiler
6	5825	Maint. Man—Insp. Equipt.
6	6210	Millwright Cl. C
6	6220	Carpenter, Cl. C
6	6225	Tinsmith, Cl. C
6	6229	Painter, Cl. B
6	6236	Pipefitter, Cl. C
7	3569	Chief S & L Mixer
7	3612	Set Up & Oper. Cut Off Mach.
7	4821	Spec. Check Insp.
7	5644	Chrome Plater
7	5737	Frost Maint. Man
7	5760	Tray Equipt. Mech.
8	3121	Relief Attendant
8	3568	Mix. & Reclaim Man
8	4032	Burner & Hot Repr. Man
8	4033	Fhth. & Lehr Oper.
8	5738	Dec. Equipt. Mech.
8	5743	Ribbon Mach. Mech.
8	6247	Concrete Fin (MRO)
9	4031	Glass Melt. Furn. Oper.
9	5655	Insp. Mach. Parts
9	5771	Instr. Svemn. Cl. B
9.1	6209	Millwright, Cl. B
9.1	6219	Carpenter, Cl. B
9.1	6224	Tinsmith, Cl. B
9.1	6228	Painter, Cl. A
9.1	6235	Pipefitter, Cl. B
10	5826	Ind. Truck Mech.
11	3120	Cng. Rib. Mach. Oper. Cl. B
11	5728	Shift Maint. Mech.
11.3	5608	Machinist, Cl. B
12	5736	Chief Frost Maint. Man
13	4012	Chief Fhth. Ctrlmn.
13.2	4030	Gl. Melt. Furn. Oper., Opt:Rdr. & Grp. Ldr.
13.3	5771	Inst. Svemn. Cl. A
13.3	6208	Millwright, Cl. A
13.3	6218	Carpenter, Cl. A
13.3	6223	Tinsmith, Cl. A
13.3	6234	Pipefitter, Cl. A
15.1	5741	Grp. Ldr. Mach. Maint.
15.3	5607	Machinist, Cl. A
16.1	3119	Cng. Rib. Mach. Oper. Cl. A

Exhibit C1 to Plaintiff's Exhibit 1.
[Responsive to Interrogatory No. 5]

FEMALE SCHEDULE FOR
DERIVING RATE RANGES AND STEPS
Cancels Sheet Effective 11/19/62
Effective January 20, 1964

Wage Group No.	*Job Eval. Points*	*Trainee Hourly Starting Rate*	*Min. of Rate Range*		*Midpt.*		*Max. of Rate Range*
1	Up to 160	$1.92					$1.965
2	165-210	1.92				$1.965	1.985
3	215-235	1.92			$1.965	1.985	2.005
4	240-265	1.92		$1.965	1.985	2.005	2.025
5	270-295	1.92	$1.965	1.985	2.005	2.025	2.045
6	300-345	1.92	1.985	2.005	2.025	2.045	2.065
7	350-395	1.965	2.005	2.025	2.045	2.085	2.125
8	400-435	1.965	2.025	2.045	2.085	2.125	2.165
9	440-475	1.985	2.045	2.085	2.125	2.165	2.205
10	480-515	2.005	2.085	2.125	2.165	2.205	2.245
11	520-555	2.025	2.125	2.165	2.205	2.245	2.285
12	560-585	2.045	2.165	2.205	2.245	2.285	2.33
13	590-615	2.085	2.205	2.245	2.285	2.33	2.375

To: Mailing List No. 2—Hourly Rate Procedure dated 12/20/63

From: Employe Services
Industrial Relations Division

By: E. B. Lewis

1/31/64

Exhibit C3 to Plaintiff's Exhibit 1.
[Responsive to Interrogatory No. 5]

Wage Gp. No.	*Job Code*	*Title*
1	1279	Cleaner
4	1364	Positioner Insp.
4	1365	Insp. & Pack.
4	1366	Insp. Cap Pack
4	1369	Insp. Pack Load
5	3756	S & L Mach. Loader
5	3798	Cer. Mach Loader
5	5102	Lab. Asst. Cl. 2
6	4674	Frost Light Insp.
6	4908	Qual. Control Insp.
6	6852	All Around Caf. Wrkr.
7.2	5101	Lab. Asst. Cl. 1
8	4830	Quality Insp.

PLAINTIFF'S EXHIBIT 4.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

DEFENDANT'S ANSWERS TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS AND FOURTH SET OF INTERROGATORIES

• • • •

Interrogatory No. 103

State the same information requested in 102, *supra*, as to female employees.

Answer

Exhibit N attached lists the information requested with respect to all females who transferred from the job of Inspector-Packer on the steady night shift to the job of Inspector-Packer on the rotating day and afternoon shifts from October 17, 1966, through December 28, 1969.

• • • •

Exhibit N to Plaintiff's Exhibit 4.
[Responsive to Interrogatory No. 103]

Employee Number	Name	N to Day Yr/Week	Base Rates Before	Base Rates After	Address	City - Town*	Zip Code	Social Security Number	Telephone
W0029	E. P. Abernathy	6/46	$2.295	$2.170	RD #1	Crooked Creek	16919	179057103	7177242210
W0702	C. L. Blair	9/19	2.775	2.600	RD #3	Wellsboro	16901	180228764	—
W0817	I. M. Brill	7/09	2.450	2.250	RD #1	Wellsboro	16901	184244588	7177244153
W0886	C. T. Brown	6/47	2.295	2.170	RD #1	Wellsboro	16901	187121779	7177244053
W1070	W. M. Campbell	9/19	2.775	2.600	10 Helvetia St.	Wellsboro	16901	166206420	7177241830
W1072	J. M. Carden	7/43	2.295	2.170	RD #1 Box 79	Wellsboro	16901	191247347	7177242447
W1722	H. R. Davis	7/47	2.550	2.340	30 Charles St.	Wellsboro	16901	162030753	7177243585
"	"	9/19	2.775	2.600	"	"	"	"	"
W1820	R. J. Dean	9/19	2.775	2.600	9 Cone Street	Wellsboro	16901	208147674	—
"	"	9/45	2.775	2.600	"	"	"	"	"
W2253	E. L. English	9/45	2.775	2.600	24 Cone Street	Wellsboro	16901	187122543	7177244479
W2948	R. L. Goodwin	7/47	2.550	2.340	92½ East Avenue	Wellsboro	16901	203204868	7177244427
"	"	9/19	2.775	2.600	"	"	"	"	"
W3240	J. S. Hall	9/28	2.775	2.600	45 Nichols Street	Wellsboro	16901	178166197	7177241289
W3321	D. A. Hart	9/18	2.775	2.600	RD #3	Wellsboro	16901	203206641	7177242423
W3429	N. A. Heatley	6/47	2.295	2.170	RD #1	Liberty	16930	191245990	7173243561
"	"	7/13	2.345	2.210	"	"	"	"	"
W3684	E. N. Hunter	9/06	2.775	2.600	5 Park Place	Wellsboro	16901	198033045	7177242725
W4678	M. Kelly	7/11	2.450	2.250	RD #6	Wellsboro	16901	203206625	7177241915
W4906	E. L. Krystoff	9/45	2.775	2.720	RD #1	Wellsboro	16901	203129512	7173537241
W5029	E. A. Litchfield	7/43	2.295	2.170	16 Norris Street	Wellsboro	16901	240340103	—
W5575	M. G. Mathews	7/15	2.250	2.140	Lincoln Street	Westfield	16950	169387905	7173672682
"	"	7/43	2.290	2.170	"	"	"	"	"
W6341	M. M. Ogden	7/15	2.250	2.140	B 102 Corey Creek	Apmansfield	16933	202323309	7176623246
W6516	J. Y. Perry	6/46	2.295	2.170	RD #4	Wellsboro	16901	190220547	7177244256
W6752	R. L. French	7/15	2.250	2.140	RD #1 Box 46	Crooked Creek	16919	169387977	7177241894
W7163	M. L. Reese	8/36	2.440	2.300	RD #4	Wellsboro	16901	195301700	7177243474
W7320	A. C. Root	6/51	2.450	2.250	RD #1	Morris	16938	187122226	—
W7990	E. F. Starkweather	6/47	2.295	2.170	RD #1	Crooked Creek	16919	166207086	—
"	"	9/44	2.775	2.600	"	"	"	"	—
W8007	M. C. Stebbins	7/01	2.450	2.250	RD #3	Wellsboro	16901	186141573	7177242582
"	"	7/07	2.450	2.250	"	"	"	"	"
"	"	7/17	2.450	2.250	"	"	"	"	"
W8077	J. E. Stocum	6/47	2.345	2.210	RD #1	Crooked Creek	16919	178166780	7177241889
W8237	R. M. Taylor	6/51	2.450	2.250	80 Central Avenue	Wellsboro	16901	190182118	7177243316
"	"	7/05	2.450	2.250	"	"	"	"	"
W8915	A. L. Vanvliet	6/47	2.295	2.170	RD #1	Wellsboro	16901	186366149	7177241579
"	"	9/37	2.710	2.600	"	"	"	"	"
W9420	N. L. Wilcox	6/51	2.450	2.250	66 Fellows Avenue	Wellsboro	16901	195165274	7177242737

August 24, 1971

* All in State of Pennsylvania

PLAINTIFF'S EXHIBIT 5.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

DEPOSITION OF PERRY SEAMANS
[March 30, 1971]

* * * *

Appearances:

For the U. S. Dept. of Labor: Plaintiff:
Isabelle R. Cappello, Esq., Washington, D. C.
Stephen K. Ernest, Esq., Philadelphia, Pa. 19107.

For Corning Glass Works: Defendant:
Scott F. Zimmerman, Esq., Reed, Smith, Shaw & McClay, Pittsburgh, Penna.

* * * *

[3] By Mr. Zimmerman: I have a prefatory comment to make for the record. The defendant has produced as a witness pursuant to plaintiff's notice of taking depositions in request to produce and permit inspection and copying pursuant to rule 30-B, six, the first witness, Mr. Perry Seamans. Mr. Seamans has been produced to testify in respect to item number A-1 and to that part of number A-1 including the major and operation of the facility at Wellsboro, Pennsylvania, that is the physical layout, shifts worked and products produced. In addition, Mr. Seamans has been produced to testify in respect to item number seven which states how the following jobs have been performed on all shifts, how they have been described in and

evaluated under any job evaluation plans and their rates particularly since June 11, 1964, and then listing five jobs including inspector packer, positioner inspector, frost light inspector, quality inspector and hiker.

In connection with that, we have produced and turned over to Plaintiff the documents called for V-5 and 6 of plaintiff's notice.

Thank you.

PERRY E. SEAMANS, duly sworn according to law, testified as follows:

By Mrs. Cappello:

[4] Q. Mr. Seamans, how long have you been employed by Corning Glass Works? A. 20 years.

Q. Have you always been at the Wellsboro plant? A. Yes.

I came here in 1951 as plant industrial engineer; from 1956 to '61, I was supervisor of production planning, and in '61 went back as plant industrial engineer, am still doing that work. There has been a change in organization where I now am called supervisor of industrial engineering but the work is the same.

Q. Since 1951, have you been concerned with job evaluation? A. All except approximately two years when I was in the production planning job, at that time the work was taken over by another person in the engineering area.

Q. What was his name? A. Donald McMeniman.

Q. Which two years were you not concerned with job evaluation? A. It was the latter part of the time that I was in the production planning area which would have been '60 and '61 approximately.

Plaintiff's Exhibit 5.

Q. Addressing yourself to your duties in connection with job evaluation, exactly what did you do: what did the [5] industrial engineer do? A. We . . . there are two answers to that. One under the S J and H system, and one under . . . under the S J and H system, the plant industrial engineer either wrote or supervised the writing of the job descriptions. Those descriptions then were presented to the central industrial engineering group in Corning, who evaluated them.

Q. You merely describe them and they were evaluated in Corning, New York? A. That's right.

Q. By whom? A. Ed Noble is not supervisor of the group which does that, which did it at that time. Ez Hester was head of that group, Ezra Hester was the staff industrial engineer at the time I started, so that all of these evaluation and organization work was done under his general supervision.

Q. Now that's under the S J and H plan? A. That's right.

Q. That's the Stephenson, Jordon and Harrison plan? A. That's right.

Q. How was it done under any other job evaluation? A. Under the Corning Glass Works evaluation plan, we write the job description: of course, writing a job description entails an investigation and analysis. We write the job description, we evaluate it at the plant, [6] we submit it then to the same group in Corning for correlation and our evaluation is either approved as is or if they question any factor, then we discuss that and usually come to an agreement on the proper value for any factor.

Q. With what do they correlate? A. With similar jobs throughout the company.

Q. In other plants? A. In other plants?

Q. How many plants does the company have? A. It's in the area of fifty. I can't tell you exactly.

Q. What is the purpose of job evaluation? A. To arrive at proper rates for each job in relation to the other rates paid in the same plant.

Q. How do you use them?

By Mr. Zimmerman: What do you mean by them?

Q. Job evaluations? A. Are you speaking of the rates or of the description?

Q. Well, after you have described a job and evaluated it, what do you do with the description and the evaluation? A. We keep it on file in our office. We supply copies to the foremen and to the union representatives.

[7] Q. Do they have an opportunity to comment or approve? A. The foremen are the source of the original information when we are making the investigation for the purpose of writing a job description. We also discuss duties with people on the floor who are performing the job. Sometimes the person we will talk to in such cases is the union representative: if fact, if the department union representative is actually doing a job, we make it a point to talk to that person. We then write the description, as we see it, and it is then taken back to the foreman, and back to the union representative to see whether or not they agree we have properly described it. If there is a question, we discuss and we may change, if they've convinced us that we have not completely or properly described the work.

Q. Do they also have an opportunity to comment on the evaluation? A. Yes.

Q. The employees? A. We have a job evaluation committee consisting of three union representatives. That

committee sits with the personnel director and the industrial engineer and we actually go over and discuss the evaluation of each of these jobs.

[8] Q. And these descriptions and evaluations are used to set rates? A. The evaluations does set—yes, you are right. I'm sorry.

Q. Do you actually observe the jobs when you describe them? A. Yes.

Q. What happens when a job changes? A. We then go through the same procedure regarding the change to see whether or not the change is significant to start with enough to be included in the description. If that is the case, then we also examine whether or not it is significant as far as the value of any factor in the evaluation is concerned.

Q. Do you have a custom where by job changes are reported, too? A. The supervisor, the duty is to report any change to us. The changes are also, are reported by the union people, if they feel that a change has been made which has not been, or may not have been recognized.

Q. At the Wellsboro plant, were certain jobs regarded as women's jobs and certain other jobs as men's jobs?

By Mr. Zimmerman: During what period of time were [9] you referring to, Mrs. Cappello?

Q. Well, ever at this point? A. There were certain jobs which were considered to be night jobs and to which only men were assigned, in other words day jobs were on the same positions, women were assigned.

Q. Well, article 16, in your collective bargaining agreement refers to women performing men's work what does that mean?

Plaintiff's Exhibit 5.

By Mr. Zimmerman: Would you show him that article, please?

Q. This, the agreement between Corning Glass Works, Wellsboro, Pa., and the American Flint Glass Workers Union of North America, A. F. of L. dated February 15, 1944.

By Mr. Zimmerman: You may answer the question if you know, Mr. Seamans.

Q. Here's article 16, it says "women on men's work" and just a minute there is another . . .

By Mr. Zimmerman:

Q. This is an agreement between Corning Glass Works, Wellsboro plant, and the American Flint Glass Workers Union of North America, 1966 to 1969. [10] A. I cannot add anything to the answer I just gave.

Q. Just a moment, this is article 16, in the 1966 to 1969 agreement, also designating women on men's work. What does that mean by "men's work"? A. The night shift jobs to which I referred have been referred to as men's work. I'm not sure whether this status quo is meant to here or not.

Q. In answering interrogatories, Mr. Seamans we were given female rate schedules and male rate schedules, and we ask for the job titles on the male rate schedules and we received a long list of jobs. That is exhibit B-3 to the defendant's answers to interrogatories which plaintiff proposes to introduce into evidence as exhibit A. We were also given an exhibit C-3 to plaintiff's proposed exhibit A a list of job titles on the female rates schedules. The jobs on the female rates schedules, would those be considered women's jobs?

Plaintiff's Exhibit 5.

By Mr. Zimmerman: Are you talking about now or are you talking about historically?

By Mrs. Cappello: Historically.

By Mr. Zimmerman: What period of time in history, if so?

[11] By Mrs. Cappello: Up until, during the period you had male and female rate schedules?

A. We had male and female rate schedules. What is concerning me is how I can honestly answer the question as to whether these were male and female jobs. They certainly were . . .

Q. Would men have performed jobs on the female rate schedule? A. No.

Q. Would women have performed jobs on the male rate schedule? A. No, and I'm distinguishing jobs by shifts at this point, not on the same shifts.

Q. On exhibit B-3, the job of positioner inspector nights, inspector packer nights, inspector cap packer nights, ceramic machine loader nights, S & L machine loader nights, frost light inspector nights, all around cafeteria worker nights, and quality inspector nights, appear on the male schedule. On the female schedule the same job titles appear without the designation "nights", is that correct? A. That's right, and I say, by shift, they were distinguished. On the night shift only men worked: on the day and afternoon shift, women.

Q. Why is that, or why was that? [12] A. It's matter of tradition which started long before I came there and for which I don't think I can honestly give a good explanation.

Q. Was a tradition when you arrived on the scene in 1951? A. Yes, it was.

Plaintiff's Exhibit 5.

Q. Was a higher base hourly rate paid for the job on the night shift? A. Yes.

By Mr. Zimmerman: Which jobs?

By Mrs. Cappello: All the jobs that were listed a minute ago. Do you wish me to repeat them?

By Mr. Zimmerman: Do you know the base hourly rates of all those jobs?

A. No, I don't know them. I don't know the rates.

By Mr. Zimmerman: Well, do you know whether or not [13] there was a higher base?

A. Yes, there was a higher base rate.

• • • •

[16] Q. Turning to Schedule A, which is designated as plaintiff's exhibit H, the ninth paragraph, that paragraph reads: "Any employee who as of the day of the installation of the CGW hourly job evaluation plan is an employee of the Wellsboro plant covered by the terms of the basic agreement and who thereafter by operation of rights under the basic agreement continues to hold or takes any of the job specified on the third shift shall receive the rate which he or she would have received for that work under pre-existing practices. Those jobs being inspector-packer, (N) positioner inspector (N), frost light inspector (N), quality inspector (N). What is the basic agreement to which paragraph 9 refers? A. The agreement is that anyone. . .

By Mr. Zimmerman: No: no, the question is what is the basic agreement to which it refers?

Plaintiff's Exhibit 5.

Q. It says, "by the terms of the basic agreement". Is that the collective bargaining agreement, or the memorandum of agreement? A. To conjecture, I'm not — it was an agreement made at the time of the option of this plant. I cannot pick it out I think from. . .

[17] Q. You don't think it's the collective bargaining agreement? A. Yes, it is, collective bargaining agreement.

• • • •

Q. Mr. Seamans, do you have any facts to tell us about what the pre-existing practices were? A. That people working on these jobs on the night shift received a rate which was different from that on the other two shifts.

Q. Was it a higher rate? A. It was a higher rate.

Q. Exclusive of the plant wide shift differential? A. Yes, and that anyone with an employee date at the date of installation of this agreement when working [18] on those particular shifts would, in effect, have a red circle rate.

Q. And that would preserve the pre-existing higher rate? A. That's right, for those people.

Q. The capital N's which appear in parens, that refers to night shift? A. That's right.

• • • •

PLAINTIFF'S EXHIBIT 6.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

(Case title omitted in printing.)

DEPOSITION OF SETH J. McKIBBIN

[July 14, 1971]

For the Plaintiff: Isabelle R. Cappello, Washington, D. C.
For the Defendant: Scott F. Zimmerman, Esq., Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania.

* * * *

[187] By Mrs. Cappello:

Q. Mr. McKibbin, would you state what jobs you have held at Corning Glass Works and the dates in which you held those jobs. A. I was employed in March of 1946 in production planning [188] activity and in January of 1949, I went into the Industrial Relations Division, and from that date forward I have been in a series of jobs involving wage and salary administration, Manager of Employee Services, and currently Manager of Statistics and Surveys in the Industrial Relations Division.

Q. I would like to ask you first about the rates for the job of inspector packer and inspector packer nights. What were the earliest rates paid for these jobs that you know of? A. Well, the job classifications were set up on job evaluation, as I recall, in October of 1947. It was with the first formal schedules that we found.

Q. Before that date were there employees performing the job of inspector packer, inspector packer nights? A. I honestly can't answer that, because we didn't have formal job evaluation and the duties weren't written down succinctly so that people knew what work was really being performed. In some cases there were titles being used that were the same, but the work was not necessarily the same, because we don't know what the work was, very frankly.

Plaintiff's Exhibit 6.

Q. If you will turn to Plaintiff's Exhibit T-65, that is the last page. That appears to be a female schedule effective January 6, 1946. Is that correct? A. I can't tell from this copy, but my recollection is that this sheet does not apply at Wellsboro. I think it is [189] labelled at the top "Corning, New York. I can't read it from this copy, but my recollection of the original it is.

[190] Q. Turning to Plaintiff's Exhibit T-61, which is a female schedule effective October 20, 1947, is this the first formal schedule? A. It is as far as I have been able to learn, yes.

* * * *

By Mrs. Cappello:

Q. Referring now to Plaintiff's Exhibit T-61, where, in what wage group number was the job of inspector packer on the female schedule? A. It was in wage group 4.

Q. And the maximum rate for that job was what? A. As of October 20, 1947, it is indicated as 91½ cents.

[191] Q. Now, the column "Job Evaluation Points," showing 240 to 265, what job evaluation system was that? A. That would be the SJ&H system.

Q. Turning to Plaintiff's Exhibit T-60, which is the male schedule effective October 20, 1947, what wage group number was the inspector packer job in? A. Inspector packer nights job was a group 3.

Q. And that is job evaluation points 240 to 295? A. That is right.

Q. Is that also in the SJ&H? A. It is.

Q. What was that maximum rate? A. Maximum for group 3 as of October 20, 1947, was $1.10-½.

Q. How much of a differential is that between the male and female schedule?

Plaintiff's Exhibit 6.

Off the record.

(Discussion off the record.)

By Mrs. Cappello:

Q. What is the differential between the job of inspector and packer on the female and male schedules? A. The difference between $1.10-½ and 91-½, or 19 cents.

Q. Continuing through the male and female rate schedules [192] up until the one effective January 20, 1964, which is Plaintiff's Exhibits 23 and 24 for the male and female schedule, did the differential remain 19 cents an hour?

Off the record.

(Discussion off the record.)

The Witness: Yes, it did.

By Mrs. Cappello:

Q. Turning to Plaintiff's Exhibits T-21 and T-20, which are the male and female schedules effective November 2, 1964, did the differential go up to 19-½ cents an hour? A. Yes, it did.

Q. Referring to Plaintiff's Exhibits T-17, 18, and 19, the conversion table, the schedule effective January 18, 1965, and the conversion schedule, would you explain what happened to the male and female schedule on these dates? A. The male and female schedules were eliminated as of 1/18/65.

Q. And how was that elimination carried out? A. Well, we devised this conversion table, which you have labeled as T-17, and the jobs which were in formerly groups 1, 2, 3, and 4A became a new group 1, old group 5A became new group 2, and so forth, as indicated on that exhibit.

Plaintiff's Exhibit 6.

Q. Now, the inspector packer rate which had been on the female schedule wage group number 4, did that go into new [193] group 1? A. Yes, ma'am.

Q. And the inspector packer nights job which was on the male schedule as wage group number 3, did that go into new group number 5? A. Yes, Ma'am.

Q. Did the rates change at all? A. The maximum rates as I recall did not change, but some of the subordinate rates did.

Q. What was the purpose of this conversion from male and female schedules to the single schedule? A. The purpose of the conversion?

Q. Yes. A. Was to move one step closer towards installation of the CGW job evaluation plan.

Q. Why was this done on January 18, 1965? A. We had met with the union to discuss job evaluation generally and as a result of that meeting, we agreed to put this into effect. It was negotiated.

Q. After the conversion to the single rate schedule—

Mr. Zimmerman: May we go off the record just a moment.

(Discussion off the record.)

By Mrs. Cappello:

Q. After the conversion to the single rate schedule, [194] the rates remained the same; is that correct? At the top of the— A. The max rates for the jobs in discussion here remained the same.

Q. Turning to Plaintiff's Exhibits T-15 and 16, rates effective November 1, 1965, did the differential between the inspector packer and the inspector packer nights job go up to 20 cents an hour? A. Twenty cents an hour, yes.

Plaintiff's Exhibit 6.

Q. Turning to Plaintiff's Exhibits T-11 and T-12, did the differential between these two jobs go up to 21½ cents an hour? A. How much did you say?

Q. Twenty-one cents an hour—correction.

Did it go up to 21 cents an hour? A. Yes, it did.

Q. Turning to Plaintiff's Exhibit T-10, effective November 4, 1968, did the differential go up to 21½ cents an hour? A. That is the difference on this schedule.

Q. Was this increase a general increase? A. All of these increases that we have been talking about were negotiated with the union, yes.

Q. And they were general increases applicable to all [195] production employees covered by the collective bargaining agreement? A. As covered by the specified formula as negotiated, yes.

Q. Turning to Plaintiff's Exhibit T-9, what happened to the inspector packer and inspector packer night jobs on this? A. In looking at T-8, this was a—

Q. Excuse me, T-8? A. Is that what you referred me to?

Q. No, T-9. A. I beg your pardon.

Q. The Corning Glass Plant rate steps schedule. A. Sorry.

Q. What rate group is the inspector packer job in? A. As I recall, that is a group 1.

Q. And the top rate for that job is $2.60 an hour, is that correct? A. As of the date of this schedule, yes.

Q. Now, looking back at Plaintiff's Exhibit T-10, the inspector packer night was getting what rate? A. Up to $2.75½.

Q. Mr. McKibbin, in all of these questions, I will be referring to the maximum rate range. A. Fine. That will simplify things.

Plaintiff's Exhibit 6.

[196] Q. And on Plaintiff's Exhibit T-10, the rates effective November 4, 1968, inspector packer, was at what rate? A. I would like to make one observation, that the—

Q. Excuse me. Answer the question first, then make the observation. A. Would you restate the question, please.

Q. On Plaintiff's Exhibit T-10, effective November 4, 1968, at what rate was the inspector packer? A. $2.54.

Q. Did you have an observation to make? A. Yes. I wanted to clarify that the November 4, 1968, date is really an administrative date, which—I think you are familiar with our position on that.

Q. Would you state it for the record? A. Actually there were no adjustments made as of November 4, 1968. Subsequent to that date, in the case of Wellsboro, there were negotiations which were consummated in a new labor agreement including a general increase made up of several different parts, and one part of that general increase formula had a retroactivity date of November 4, 1968. But specifically on November 4, 1968, no rates changed via a general increase.

Q. When did the rates shown on Exhibit T-10 actually start to be paid to employees? [197] A. It was some date in January 1969.

Q. Would it be January 10, 1969? A. No, it wouldn't be January 10, 1969. It would be probably the thirteenth January 13th.

Q. Turning to Exhibit T-9, the Corning Glass Works Plant rate step schedule, when did the inspector packer start to receive the $2.60 rate? Would that be January 20, 1969? A. Yes, ma'am.

Plaintiff's Exhibit 6.

Q. So the rates on Plaintiff's Exhibit T-10 went in January 13th and the rates on Plaintiff's Exhibit T-9 went in on January 20, 1969; is that correct? A. Would you restate that, please.

Q. The rates on Plaintiff's Exhibit T-10 went into effect on January 13, 1969, and the rates on Plaintiff's Exhibit T-9 went into effect on January 20, 1969; is that correct? A. I am troubled by the word "effective," because we use—we have used the term several different ways. But there were people paid on January 13th in accordance with a table, T-10, and on January 20th people were paid in accordance with the table T-9.

Q. Perhaps to make it simpler, an inspector packer on the night shift on January 13 was paid $2.75½; is that correct? A. Yes, ma'am.

Q. And on January 20, 1969, the rate became $2.60; is [198] that correct? A. The rate for—the job evaluated rate for the job became $2.60. The way incumbent employee was paid could be different.

Q. Well, explain that, please. A. We agreed as part of our installation of the CGW plan that all employees would receive an increase of no less than 2 cents an hour.

Q. Let's take an inspector packer working on the night shift who on January 13, 1969, is receiving $2.75½ cents an hour. What happened to his rate on January 20, 1969? A. He received a 2 cent increase.

Q. So he then received $2.77½ cents an hour? A. That is my recollection, yes.

Q. He did not receive the job evaluated rate of $2.60, is that correct? A. An employee was on the payroll January 13th on January 20th did not receive $2.60.

Q. Would you explain how that came about? A. Yes. That was a revision that the union and management negotiating teams agreed upon and that was that employees who had service as of January 20, 1969, would be accorded specific treatment, as I have enumerated, whereas employees [199] hired on and after—well, after January 20th would strictly follow the CGW job evaluation rate structure. It was a matter of service.

Q. Was that in accordance with your memorandum of agreement signed with the collective bargaining agreement? A. It is part of the negotiations, yes.

Mrs. Cappello: Off the record a minute.

(Discussion off the record.)

By Mrs. Cappello:

Q. In Plaintiff's Exhibit H to these depositions is schedule A to Corning Glass Works job evaluation installation rules, Wellsboro, Pennsylvania.

Would you read paragraph 9 for the record and tell me whether that is the reason for the night inspector packer retaining the higher rate? (Handing document to witness) A. Paragraph 9 reads as follows:

"Any employee who, as of the date of the installation of the CGW hourly job evaluation plan, is an employee of the Wellsboro Plant covered by the terms of the basic agreement and who thereafter by operation of rights under the basic agreement continues to hold or takes any of the jobs specified on the third shift, shall receive the rate which he or she would have received for that work under preexisting practices, those jobs being inspector packer [200] nights, positioner inspector nights, frost light inspector nights,

quality inspector nights. Persons who became employees after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs."

I think the intent of paragraph 9 was as I have stated it, the words literally don't apply. And I believe I explained this previously.

Q. Would you reexplain it for us? A. Yes. Paragraph 9 was lifted from the agreement applying to another plan and literally does not apply to the Wellsboro Plant. It can't. If you take it literally, it says: We are going to pay anybody going on the night shift a rate of I believe it would be $2.75½—no, it would be $2.55. And yet that is not what we did.

It says we would pay them the rate that they would have gotten under preexisting conditions and the preexisting—the last condition that we had was that they would have gotten I believe it is $2.55.

Q. And pursuant to the collective bargaining agreement of January 1969, in fact they were receiving $2.77½ an hour, is that correct? A. That is as I recall it, yes.

Q. Paragraph 9, however, does explain why the night [201] shift inspector packers continue to receive a higher rate than the job evaluated rate, is that not so? A. I have trouble saying that it explains it. It was intended to explain it, but I fear, in retrospect, that does an inadequate job is what I am trying to say.

Q. Is there any other provision of the collective bargaining agreement which does explain? A. None explains it any better than that does.

The fact is that it doesn't really convey what we did. And I might add, there is agreement among the parties

that what we did was what we intended to do, and our language doesn't adequately cover it.

Q. Is this what you call red circling a rate? A. I believe that is common nomenclature.

Q. Turning to Plaintiff's Exhibit 8, which is the memorandum of agreement dated January 10, 1969, paragraph 3, would you read the first paragraph of that, please. (Handing document to witness.) A. Paragraph 3 reads:

"Protection against wage reductions of persons currently having rates for jobs which are higher than those resulting from the above procedure is set forth in the attached schedule A."

Q. And is that paragraph 9 of schedule A that you [202] previously read? A. I believe paragraph 3 refers to schedule A in its entirety and there are other provisions for treatment of rates than the paragraph in question.

Q. Is this a long-standing practice of Corning Glass Works to red circle a rate that is reduced through job evaluation? A. I think the term "red circling" was new to us with the CGW job evaluation plan, though there is a provision in our contract that says when job evaluation results in lower rates, that we won't reduce the incumbent employees.

Q. Has that provision been in all your contracts back to 1944? A. I haven't verified it, but I don't think it would go back to 1944, but it would go back to an early date in our union relationship.

Mrs. Cappello: Off the record.

(Discussion off the record.)

Plaintiff's Exhibit 6.

By Mrs. Cappello:

Q. Mr. McKibbin, I hand you copy of the 1944 collective bargaining agreement and ask you to read section 15, section 2, into the record. (Handing document to witness.) A. Article 15, section 2, reads as follows:

"When job evaluation as above outlined results in [203] wage brackets lower than prevailing rates then paid for the job, it is not the intention of the company to reduce the prevailing base rates of employees currently working on such jobs."

Q. Has that section been in all your succeeding contracts? A. I believe it has.

(Discussion off the record.)

The Witness: My answer would be, after reading the current contract, it is still there, article 15, section 2.

By Mrs. Cappello:

Q. Turning to Plaintiff's Exhibit T-8, which is the SJ&H plan, rates step table dated January 20, 1969, how was this used on January 20, 1969? A. The rate structure that was installed on January 20, 1969, had to convert old rates and rate ranges to new rates and rate ranges. And this table was an assignment, an arbitrary assignment of rates by group numbers to a particular position in the rate range so that employees would receive a new rate consistent with our negotiation program.

Q. And this table shows that being an inspector packer who was in rate group 1 was receiving $2.54 an hour and inspector packer nights, in rate group 4, in rate group 5, was receiving $2.75½ an hour. Is that correct?

Plaintiff's Exhibit 6.

[204] A. This table doesn't show anything on inspector packers as such. All it does is assign the rates that were being paid to the inspector packers to a particular position in the rate range for converting that rate to a new rate.

Q. But at that time the inspector packer, on day and afternoon shift was in rate group 1, was he not? A. Yes.

Q. And the inspector packer on the night shift was in rate group number 5, is that not right? A. That is right.

Q. So those rates I stated are correct, is that not right? A. I guess you will have to restate it.

Q. $2.54 for the inspector packer on the day and afternoon shift, $2.75½ an hour for inspector packer on the night shift? A. Yes. The rates prior to our negotiation were $2.34 and $2.55.

Q. What are you reading from, Mr. McKibbin? A. I am reading from T-11.

Q. All right. A. And then phase 1 of the general increase program increased those rates, as I remember the formula, 20 cents or 8 percent, whichever is greater. And then there was a further [205] increase to the January 20th rate as detailed really on T-6, T-6 being the hourly rate structure that went into effect January 20, 1969.

Q. Well, now looking at T-6 and taking employees with a service date prior to January 20, 1969, the inspectors on the day and afternoon shift are receiving what rate? A. Up to $2.60 an hour.

Q. And on the night shift, what rate are they receiving? A. They would be receiving a red circle rate in excess of $2.60 per hour.

Q. What would that be? A. $2.77½.

Q. Wouldn't it be $2.79? A. I don't believe so. I think

if it was $2.75½—let's see, if it was $2.55 on November 1, 1967, then it went up 8 percent or 20 cents plus a minimum of 2 cents. So I would guess that it was $2.77½.

Q. So the differential between those day and afternoon and night shift inspectors would now be 17½ cents an hour, is that correct? A. Yes.

Q. According to T-6.

Mr. Zimmerman: With respect to which group of employees?

[206] Mrs. Cappello: The ones with service date of January 20, 1969, or earlier.

The Witness: Yes, ma'am.

By Mrs. Cappello:

Q. On Plaintiff's Exhibit T-7, which is a conversion schedule effective November 4, 1968, are the inspectors on the day and afternoon shift in group 1 then paid $2.54 an hour? A. Yes, on this T-7.

Q. And the night inspectors would be at $2.75½? A. Yes, ma'am.

Q. Now, there is a date down at the bottom, January 14, 1969. Is that when those dates were actually paid? A. That January 14th day is actually the date this sheet of paper was typed.

Q. When were these rates actually paid to the employees? Were they actually paid on November 4, 1968? A. No, they were not. And I believe I just covered this earlier.

Q. It was January 13th? A. They were made effective —people on those jobs on January 13th were initially paid for their time at a higher rate than previously. The check was actually paid sometime later, of course.

Plaintiff's Exhibit 6.

Q. But those employees working on these jobs on January 13, 1969, were actually paid the rates indicated on this exhibit, [207] is that correct? A. Yes, ma'am.

Q. Now, you mentioned something about a 2 cents an hour increase. When did that take place? A. That was part of the settlement that the union-management negotiators agreed upon and I believe the date is January 10, 1969.

Mrs. Cappello: Off the record.

(Discussion off the record.)

By Mrs. Cappello:

Q. Mr. McKibbin, the 2 cents an hour increase provided for in the collective bargaining agreement of January 10, 1969, would you explain who received that 2 cents an hour and when it went into effect? A. The 2 cents an hour is a minimum. Everyone did not receive 2 cents.

Q. Who did? A. Some people received more. The people who received the 2 cents were those whose before and after job evaluated rates, if you will, would pay them less than the 2 cents. It is difficult to explain in words.

Q. For instance, the inspectors on the night shift would receive the 2 cents, is that correct? A. They would receive the minimum of the 2 cents.

[208] Q. The day and afternoon shift inspectors would not because their job rate went up under job evaluation, is that correct? A. That is right. Actually the nights job was eliminated under the CGW evaluation program.

Q. Was the job eliminated or just the designation? A. From a job evaluation standpoint, we have but one job of inspector packer now whereas prior to January 20th, we had two jobs.

Q. Was this a change in job duties or change in designation? A. It was a change in job evaluation principle, I guess would be the right way to describe it.

You will have to talk to a job evaluation expert on this. All I know is what they tell me.

Q. I think Mr. Seamans testified to this. We won't pursue that.

The 2 cents an hour increase for those entitled to it took place on January 20, 1969; is that correct? A. They received the 2 cents for time worked on January 20th for the first time.

There was, however, a retroactive period of time that they also were similarly compensated.

Q. Suppose you explain the retroactivity provisions. [209] A. Well, it is detailed in the agreements there, but, in essence—

Q. Excuse me, which agreements? A. Well, the basic agreement and the job evaluation agreement.

Q. Thank you. A. There were two parts, at least two parts that were retroactive. There were actually more parts, but in regard to wage rates, there were two features of the general increase that were made retroactive. One was section 7, article 25, on page 33 of our contract booklet, was made retroactive to a date November 4, 1968. Then in the job evaluation agreement consummated at the same time, there was a retroactive feature for the job evaluation adjustment. My recollection is that that went back to November 11, 1968.

Q. Was this an arbitrary computation based upon jobs held on a certain day? A. It was.

Q. Is there anything else you would like to explain about retroactivity pay? A. I hope not.

Plaintiff's Exhibit 6.

Mrs. Cappello: Off the record.

(Discussion off the record.)

By Mrs. Cappello:

Q. Turning now to Plaintiff's Exhibit T-6, which is [210] effective January 20, 1969, I believe you explained that already, Mr. McKibbin.

Turning to Plaintiff's Exhibit T-5, effective November 3, 1969, an inspector packer on the day and afternoon shift with seniority as of January 20, 1969, receives what rate of pay at the top? A. $2.72 maximum.

Q. An inspector packer working on the night shift who has seniority as of January 20, 1969, receives what rate? A. That rate is not on Exhibit T-5.

Q. What would be the rate? A. $2.89½.

Q. Turning to Plaintiff's Exhibit T-4, which is effective January 5, 1970, inspector packer with seniority as of January 20, 1969, on the day and afternoon shift, receives what rate? A. $2.74½.

Q. And night inspector with same seniority receives what rate? A. One percent higher than $2.89½. It is not on this sheet.

Q. What would that be? A. $2.92½.

Q. Turning to Plaintiff's Exhibit T-3, effective [211] November 2, 1970, an inspector packer on the day and afternoon shift with seniority as of January 20, 1969, receives what rate? A. $2.85½.

Q. And a night inspector of the same seniority receives what rate? A. 4 percent over $2.92½.

Q. What would that be?

(Discussion off the record.)

The Witness: My mathematics say it is $3.04.

Plaintiff's Exhibit 6.

By Mrs. Cappello:

Q. Turning to Plaintiff's Exhibit T-2, a day and afternoon shift inspector with seniority as of January 20, 1969, receives what rate? A. $2.88½.

Q. And the night inspector at the same seniority receives what rate? A. $3.07.

Q. And that is effective January 4, 1971; is that correct? A. Yes, ma'am.

Q. Are there going to be any rate changes between now and October 18, 1971? A. There are none provided in our contract.

Mrs. Cappello: Off the record.

[212] (Discussion off the record.)

By Mrs. Cappello:

Q. Are the explanations for Plaintiff's Exhibits T-1 through T-65 also applicable also for rates of positioner inspector and positioner inspector nights? A. The inspector and packer job classification and the positioner inspector job classifications have been treated similarly. I should say identically, as I recall they are identical.

Q. The frost light inspector and frost light inspector night jobs, would your testimony as to the inspector packer and inspector packer night jobs and Plaintiff's T-1 through T-65 also apply to frost light inspector? A. The rates applicable could be similarly determined in that fashion, yes.

Q. And the rates for the job of quality inspector, quality inspector nights, would the same explanation apply to those jobs in connection with Plaintiff's Exhibits T-1 to T-65? A. The job classification quality inspector as I recall did not come into being until a date in March of 1969, I don't

have that date right in front of me; but to that extent, anything on the T-1 through T-65 bit would not apply until March 24, 1969, which is the date on which the job was created. That [213] is in our answer 62.

Q. Now, you testified that the rates for positioner inspector and for inspector packer day and afternoon, and nights are identical. Would you give us the rates for the frost light inspector and the frost light inspector night job since October 2, 1966, as applied to employees with seniority as of January 20, 1969? A. For the job of—

Q. Frost light inspector. A. —frost light inspector.

Mrs. Cappello: Off the record.

(Discussion off the record.)

Mrs. Cappello: On the record.

Mr. Zimmerman and Mrs. Cappello will meet in Pittsburgh at the law offices of Reed, Smith, Shaw and McClay on September 15 at ten a.m.

By Mrs. Cappello:

Q. Using Plaintiff's Exhibits T-1 through T-14, would you please state the rates that frost light inspectors, on the day, afternoon and night shift, received who had seniority as of January 20, 1969. A. Actually I have to go back to T-15 in order to establish the rate on October 2, 1966.

Q. All right. A. And if we can understand the conditions, I have [214] reconstructed the rates here.

Q. All right. A. And as of October 2, 1966, from T-15, I have the day rate of $2.28½ an hour and the night rate of $2.44½ an hour.

As of November 1, 1966, as shown on T-13, the day rate is $2.34½; the night rate of $2.50½.

Plaintiff's Exhibit 6.

As of November 1, 1967, using T-11, the rate on days became $2.44 and on nights became 2.605.

Now I jumped over the November 4th problem, if you will, to identify from T-6 that on January 20, 1969, the rate on days was $2.74½.

Q. All right. Now, what was the rate on January 13, 1969?

Mr. Zimmerman: See, Isbelle, this gets into the whole transitional problem.

Mrs. Cappello: That's right.

Mr. Zimmerman: Really there was a rate as of the contract of January 10, 1969. And although that rate was arrived at in two stages, seven days apart, there is really—as a practical matter, there is a rate that resulted from those jobs from that agreement and that would be the rate as of January 20. It doesn't seem to me you gain a heck of a lot and it is so confusing when you start to tear it down two, three, four days at a time.

[215] Mrs. Cappello: Well, I think it is relevant to the case, though.

By Mrs. Cappello:

Q. So on January 13, 1969, would you give us the rates, Mr. McKibbin. A. On January 13, 1969, the day rate would have been $2.64 and the night rate would have been $2.81½.

Q. Now, January 20. A. On January 20, 1969, using T-6, and resulting from the same agreement, the day rate was $2.74½ and the night rate was actually eliminated. The job was eliminated. But employees who had service as of January 20, 1969, and who went on the night shift,

steady night shift I should say, would have received $2.83½ as a red circle rate.

Then on November 3, 1969, using T-5, the day rate would have been $2.86½ and the red circle rate on the night shift would have been $2.95½.

January 5, 1970, using T-4, the day rate is $2.89½ and the red circle rate on the night shift would be $2.98½.

November 2, 1970, using T-3, the day rate was $3.01 and the red circle rate on the night shift would be $3.10½.

And on January 4, 1971, using T-2, the day rate would be $3.04 and the red circle rate on the night shift would be $3.13½, all subject to verification that my longhand arithmetic is accurate.

[216] Q. Would you give us the same calculation for quality inspectors? A. It will take time.

Q. All right.

Mr. Zimmerman: Perhaps you can determine, first of all, whether quality inspectors is like either of the other two.

The Witness: It isn't.

(Discussion off the record.)

By Mrs. Cappello:

Q. Mr. McKibbin, would you now tell us the rates of quality inspectors on the day, afternoon and night shifts with seniority as of January 20, 1969, since October 2, 1966. A. Subject to the same considerations that I cited in the last question, the rates I have developed are as follows: 10/2/66, in accordance with T-16, the day rate was $2.33½, and the rate for the steady night shift was $2.56.

11/1/66, in accordance with T-13, the rates became $2.39½ on the day shift and $2.62 on the night shift.

Plaintiff's Exhibit 6.

Q. When you say day shift, you also mean day and afternoon? A. Yes, ma'am. And when I say night shift, I mean steady nights.

Q. All right. [217] A. As of 11/1/67, in accordance with T-11, the day rate became $2.49 and the night rate became $2.72½.

And on January 13, 1969, using T-10, the day rate for that brief period of time was $2.69 and the rate for the steady night shift was $2.94½.

Then on January 20, 1969, using T-6, the day rate became $2.79; the night shift job was cancelled as such and the incumbent—scratch "incumbent"—the employees with seniority became entitled to a red circle rate of $2.96½.

And on November 3, 1969, using T-5, the day rate became $2.91 and the red circle rate on the night shift became $3.08½.

On January 5, 1970, using T-4, the day rate became $2.94 and the red circle rate for employees on the steady night shift became $2.11½.

Q. Wait a minute, $2.11½? $3.11? A. Beg your pardon, $3.11½.

On November 2, 1970, using T-3, the day rate became $3.06 and the red circle rate on the night shift became $3.24.

And on January 4, 1971, according to T-2, the day rate became $3.09 and the red circle rate on the night shift became $3.27.

• • • •

Exhibit T-1 to Plaintiff's Exhibit 6.

WELLSBORO PLANT – RATE SCHEDULE

EFFECTIVE DATE	ISSUED DATE	DESCRIPTION	CANCELS SHEET EFFECTIVE	
1-4-71	12-18-70	C/L-II	11-2-70	
11-2-70	10-16-70	Genl. Increase	1-5-70	
1-5-70	12-22-69	C/L-I	11-3-69	
11-3-69	10-6-69	G. I.	1-20-69	
1-20-69	1-14-69	C.G.W. JE	–	
11-4-68	1-14-69	G.I.	11-1-67	
11-1-67	10-5-67	G.I.	11-1-66	Exh.–F-3
11-1-66	10-20-66	G.I.	11-1-65	Exh.–F-2
11-1-65	1-17-66	G.I.	1-18-65	Exh.–F-1
1-18-65	1-14-65	Rate Adj.	11-2-64	
11-4-64	10-21-64	G.I.	1-20-64	Exh. B-2-M; C-2 F
1-20-69	1-31-64	G.I.	11 19-62	Exh. B-1-M; C-1 F
11-19-62	1-14-63	G.I.	12-4-61	
12-4-61	1-22-62	G.I.	11-28-60	
11-28-60	12-27-60	G.I.	11-30-59	
11-30-59	12-19-59	G.I.	12-1-58	
12-1-58	12-2-58	G.I.	11-25-57	
11-25-57	12-2-57	G.I.	11-26-56	
11-26-56	11-27-56	G.I.	10-24-55	
10-24-55	10-28-55	G.I.	11-22-54	
11-22-54	11-22-54	G.I.	10-19-53	
10-19-53	10-30-53	G.I.	11-3-52	
11-3-52	2-7-53	G.I.	10-22-51	
10-22-51	11-1-57	G.I.	10-9-50	
10-9-50	10-7-50	G.I.	11-14-48	
11-19-43	11-13-48	G.I.	–	
10-20-47	10-24-47	G.I.	–	
10-21-46	10-24-46	G.I.	–	
1-6-46	1-12-46	G.I.	–	

Exhibit T-2 to Plaintiff's Exhibit 6.

Corning Glass Works, Industrial Relations Procedure, Hourly Employes

101B, HOURLY RATE PROCEDURE—Merit Plan

Supplement A, Hourly Rate Schedule

Cancels: 11-2-70
Effective: 1-4-71

WELLSBORO, PENNSYLVANIA

Gp. No.	Point Schedule Min.	Point Schedule Max.	Trainee Start	Rate Schedule Minimum	2nd	1&1-Pt.	4th	Maximum
1	885	900			$2.755 a	$2.79 b	$2.835	$2.885
2	905	925		$2.755 a	2.79 b	2.835	2.885	2.935
3	930	950	$2.755 a	2.79 b	2.835	2.885	2.935	3.005 c
4	955	975	2.755 a	2.835	2.885	2.935	3.005	3.04
5	980	1000	2.755 a	2.885	2.935	3.005	3.04	3.09
6	1005	1025	2.79 b	2.935	3.005	3.04	3.09	3.135
7	1030	1055	2.835	3.005	3.04	3.09	3.135	3.195
8	1060	1085	2.885	3.04	3.09	3.135	3.195	3.27
9	1090	1115	2.935	3.09	3.135	3.195	3.27	3.345
10	1120	1150	3.005	3.135	3.195	3.27	3.345	3.435
11	1155	1185	3.04	3.195	3.27	3.345	3.435	3.53
12	1190	1220	3.09	3.27	3.345	3.435	3.53	3.625
13	1225	1260	3.135	3.345	3.435	3.53	3.625	3.71
14	1265	1300	3.195	3.435	3.53	3.625	3.71	3.815
15	1305	1340	3.27	3.53	3.625	3.71	3.815	3.925
16	1345	1380	3.345	3.625	3.71	3.815	3.925	4.06
17	1385	1420	3.435	3.71	3.815	3.925	4.06	4.19
18	1425	1460	3.53	3.815	3.925	4.06	4.09	4.335

a) Time progression increase due after one (1) month.

b) Time progression increase due after three (3) months.

c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service towards his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/rg
12-18-70

Exhibit T-3 to Plaintiff's Exhibit 6.

Corning Glass Works, Industrial Relations Procedure, Hourly Employes

101B, Hourly Rate Procedure--Merit Plan

Supplement A, HOURLY RATE STRUCTURE

Cancels: 1-5-70
Effective: 11-2-70

WELLSBORO, PENNSYLVANIA

Gp. No.	Point Schedule Min.	Point Schedule Max.	Trainee Start	Rate Schedule Minimum	2nd	Mid-Pt.	4th	Maximum
1	885	900	$	$	$2.73 a	$2.76 b	$2.805	$2.855
2	905	925		2.73 a	2.76 b	2.805	2.855	2.905
3	930	950	2.73 a	2.76 b	2.805	2.855	2.905	2.975 c
4	955	975	2.73 a	2.805	2.855	2.905	2.975	3.01
5	980	1000	2.73 a	2.855	2.905	2.975	3.01	3.06
6	1005	1025	2.76 b	2.905	2.975	3.01	3.06	3.105
7	1030	1055	2.805	2.975	3.01	3.06	3.105	3.165
8	1060	1085	2.855	3.01	3.06	3.105	3.165	3.24
9	1090	1115	2.905	3.06	3.105	3.165	3.24	3.31
10	1120	1150	2.975	3.105	3.165	3.24	3.31	3.40
11	1155	1185	3.01	3.165	3.24	3.31	3.40	3.495
12	1190	1220	3.06	3.24	3.31	3.40	3.495	3.59
13	1225	1260	3.105	3.31	3.40	3.495	3.59	3.675
14	1265	1300	3.165	3.40	3.495	3.59	3.675	3.775
15	1305	1340	3.24	3.495	3.59	3.675	3.775	3.885
16	1345	1380	3.31	3.59	3.675	3.775	3.885	4.02
17	1385	1420	3.40	3.675	3.775	3.885	4.02	4.15
18	1425	1460	3.495	3.775	3.885	4.02	4.15	4.29

a) Time progression increase due after one (1) month,

b) Time progression increase due after three (3) months.

c) On transfer to an equal or lower rated job:

1) An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2) An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/ep
October 16, 1970

Exhibit T-4 to Plaintiff's Exhibit 6.

Corning Glass Works, Industrial Relations Procedure, Hourly Employes

101B, Hourly Rate Procedure–Merit Plan

Supplement A, HOURLY RATE STRUCTURE

Cancels: 11-3-69
Effective: 1-5-70

WELLSBORO, PENNSYLVANIA

Gp. No.	Point Schedule Min.	Point Schedule Max.	Trainee Start	Rate Schedule Minimum	2nd	Mid-Pt.	4th	Maximum
1	885	900	$	$	$2.625 a	$2.655 b	$2.695	$2.745
2	905	925		2.625 a	2.655 b	2.695	2.745	2.795
3	930	950	$2.625 a	2.655 b	2.695	2.745	2.795	2.86 c
4	955	975	2.625 a	2.695	2.745	2.795	2.86	2.895
5	980	1000	2.625 a	2.745	2.795	2.86	2.895	2.94
6	1005	1025	2.655 b	2.795	2.86	2.895	2.94	2.985
7	1030	1055	2.695	2.86	2.895	2.94	2.985	3.045
8	1060	1085	2.745	2.895	2.94	2.985	3.045	3.115
9	1090	1115	2.795	2.94	2.985	3.045	3.115	3.185
10	1120	1150	2.86	2.985	3.045	3.115	3.185	3.27
11	1155	1185	2.895	3.045	3.115	3.185	3.27	3.36
12	1190	1220	2.94	3.115	3.185	3.27	3.36	3.45
13	1225	1260	2.985	3.185	3.27	3.36	3.45	3.535
14	1265	1300	3.045	3.27	3.36	3.45	3.535	3.63
15	1305	1340	3.115	3.36	3.45	3.535	3.63	3.735
16	1345	1380	3.185	3.45	3.535	3.63	3.735	3.865
17	1385	1420	3.27	3.535	3.63	3.735	3.865	3.99
18	1425	1460	3.36	3.63	3.735	3.865	3.99	4.125

a) Time progression increase due after one (1) month.

b) Time progression increase due after three (3) months.

c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/khc
December 22, 1969

Exhibit T-5 to Plaintiff's Exhibit 6.

Corning Glass Works, Industrial Relations Procedure, Hourly Employes

101B, Hourly Rate Procedure--Merit Plan

Supplement A, HOURLY RATE STRUCTURE

Cancels: 1-20-69
Effective: 11-3-69

WELLSBORO, PENNSYLVANIA

Gp. No.	Point Schedule Min.	Point Schedule Max.	Trainee Start	Min.	2nd	Mid-Point	4th	Max.
1	885	900	$	$	$2.60 a	$2.63 b	$2.67	$2.72
2	905	925		2.60 a	2.63 b	2.67	2.72	2.765
3	930	950	2.60 a	2.63 b	2.67	2.72	2.765	2.83 c
4	955	975	2.60 a	2.67	2.72	2.765	2.83	2.865
5	980	1000	2.60 a	2.72	2.765	2.83	2.865	2.91
6	1005	1025	2.63 b	2.765	2.83	2.865	2.91	2.955
7	1030	1055	2.67	2.83	2.865	2.91	2.955	3.013
8	1060	1085	2.72	2.865	2.91	2.955	3.015	3.085
9	1090	1115	2.765	2.91	2.955	3.015	3.085	3.155
10	1120	1150	2.83	2.955	3.015	3.085	3.155	3.24
11	1155	1185	2.865	3.015	3.085	3.155	3.24	*3.325
12	1190	1220	2.91	3.085	3.155	3.24	3.325	3.415
13	1225	1260	2.955	3.155	3.24	3.325	3.415	3.50
14	1265	1300	3.015	3.24	3.325	3.415	3.50	3.595
15	1305	1340	3.085	3.325	3.415	3.50	3.595	3.70
16	1345	1380	3.155	3.415	3.50	3.595	3.70	3.825
17	1385	1420	3.24	3.50	3.595	3.70	3.825	3.95
18	1425	1460	3.325	3.595	3.70	3.825	3.95	4.085

a) Time progression increase due after one (1) month.

b) Time progression increase due after three (3) months.

c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

*Corrected 10-28-69

GHB/khe
October 6, 1969

Exhibit T-6 to Plaintiff's Exhibit 6.

Corning Glass Works, Industrial Relations Procedure, Hourly Employes

101B Hourly Rate Procedure—Merit Plan

Supplement A. HOURLY RATE STRUCTURE

Cancels: 11-04-68
Effective: 1-20-69

WELLSBORO, PENNSYLVANIA

Gp. No.	Point Schedule Min.	Point Schedule Max.	Trainee Start	Min.	2nd	Mid-Pt.	4th	Max.
1	885	900	$	$	$2.48 a	$2.51 b	$2.55	$2.60
2	905	925		2.48 a	2.51 b	2.55	2.60	2.645
3	930	950	2.48 a	2.51 b	2.55	2.60	2.645	2.71 c
4	955	975	2.48 a	2.55	2.60	2.645	2.71	2.745
5	980	1000	2.48 a	2.60	2.645	2.71	2.745	2.79
6	1005	1025	2.51 b	2.645	2.71	2.745	2.79	2.835
7	1030	1055	2.55	2.71	2.745	2.79	2.835	2.895
8	1060	1085	2.60	2.745	2.79	2.835	2.895	2.965
9	1090	1115	2.645	2.79	2.835	2.895	2.965	3.035
10	1120	1150	2.71	2.835	2.895	2.965	3.035	3.12
11	1155	1185	2.745	2.895	2.965	3.035	3.12	3.205
12	1190	1220	2.79	2.965	3.035	3.12	3.205	3.295
13	1225	1260	2.835	3.035	3.12	3.205	3.295	3.38
14	1265	1300	2.895	3.12	3.205	3.295	3.38	3.475
15	1305	1340	2.965	3.205	3.295	3.38	3.475	3.58
16	1345	1380	3.035	3.295	3.38	3.475	3.58	3.705
17	1385	1420	3.12	3.38	3.475	3.58	3.705	3.83
18	1425	1460	3.205	3.475	3.58	3.705	3.83	3.965

a) Time progression increase due after one (1) month.

b) Time progression increase due after three (3) months.

c) On transfer to an equal or lower rated job;

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/cp
1-20-69 Additional copies available

Exhibit T-7 to Plaintiff's Exhibit 6.

WELLSBORO
CONVERSION SCHEDULE
Cancels: 11-1-67
Effective: 11-4-68

REGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
1	2.425		2.54
2	2.455		2.585
3	2.50		2.64
4	2.54		2.69
5	2.54		2.755
6	2.54	2.585	2.815
7	2.54	2.64	2.875
8	2.54	2.69	2.945
9	2.585	2.755	3.015
10	2.64	2.815	3.10
11	2.69	2.875	3.185
12	2.755	2.945	3.285
13	2.815	3.015	3.36
14	2.875	3.10	3.445
15	2.945	3.185	3.54
16	3.015	3.285	3.63
17	3.10	3.36	3.715
18	3.185	3.445	3.82

IRREGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
4.2		2.64	2.69
11.1		3.015	3.185
13.3		3.10	3.36
15.2		3.185	3.54
15.3		3.285	3.54
17.1		3.36	3.715
17.3		3.445	3.715
18.1		3.445	3.82

Exhibit T-8 to Plaintiff's Exhibit 6.

S J & H PLAN RATE STEP TABLE

Rate Grp.	Rate Step #1	Rate Step #2	Rate Step #3	Rate Step #4	Rate Step #5	Rate Step #6	Rate Step #7	Rate Shown or Higher #8
1					Up to-2.450	2.455-2.495	2.500-2.535	2.540
2					Up to-2.495	2.500-2.535	2.540-2.580	2.585
3					Up to-2.535	2.540-2.580	2.585-2.635	2.640
4					Up to-2.580	2.585-2.635	2.640-2.685	2.690
5				Up to-2.580	2.585-2.635	2.640-2.685	2.690-2.750	2.755
6			Up to-2.580	2.585-2.635	2.640-2.685	2.690-2.750	2.755-2.810	2.815
7		Up to-2.580	2.585-2.635	2.640-2.685	2.690-2.750	2.755-2.810	2.815-2.870	2.875
8	Up to-2.580	2.585-2.635	2.640-2.685	2.690-2.750	2.755-2.810	2.815-2.870	2.875-2.940	2.945
9	Up to 2.635	2.640-2.685	2.690-2.750	2.755-2.810	2.815-2.870	2.875-2.940	2.945-3.010	3.015
10	Up to 2.685	2.690-2.750	2.755-2.810	2.815-2.870	2.875-2.940	2.945-3.010	3.015-3.095	3.100
11	Up to 2.750	2.755-2.810	2.815-2.870	2.875-2.940	2.945-3.010	3.015-3.095	3.100-3.180	3.185
12	Up to 2.810	2.815-2.870	2.875-2.940	2.945-3.010	3.015-3.095	3.100-3.180	3.185-3.280	3.285
13	Up to 2.870	2.875-2.940	2.945-3.010	3.015-3.095	3.100-3.180	3.185-3.280	3.285-3.355	3.360
14	Up to 2.940	2.945-3.010	3.015-3.095	3.100-3.180	3.185-3.280	3.285-3.355	3.360-3.440	3.445
15	Up to 3.010	3.015-3.095	3.100-3.180	3.185-3.280	3.285-3.355	3.360-3.440	3.445-3.535	3.540
16	Up to 3.095	3.100-3.180	3.185-3.280	3.285-3.355	3.360-3.440	3.445-3.535	3.540-3.625	3.630
17	Up to 3.180	3.185-3.280	3.285-3.355	3.360-3.440	3.445-3.535	3.540-3.625	3.630-3.710	3.715
18	Up to 3.280	3.285-3.355	3.360-3.440	3.445-3.535	3.540-3.625	3.630-3.710	3.715-3.815	3.820

GHB/cp
Date 1-20-69

CGW PLAN RATE STEP TABLE

Evaluation Points Minimum – Maximum			Rate Grp.	RATE STEPS 1st	2nd	3rd	4th	5th	6th	7th	8th
0885	thru	0900	1	2.480	2.480	2.480	2.480	2.480	2.510	2.550	2.600
0905	thru	0925	2	2.480	2.480	2.480	2.480	2.510	2.550	2.600	2.645
0930	thru	0950	3	2.480	2.480	2.480	2.510	2.550	2.600	2.645	2.710
0955	thru	0975	4	2.480	2.480	2.510	2.550	2.600	2.645	2.710	2.745
0980	thru	1000	5	2.480	2.510	2.550	2.600	2.645	2.710	2.745	2.790
1005	thru	1025	6	2.510	2.550	2.600	2.645	2.710	2.745	2.790	2.835
1030	thru	1055	7	2.550	2.600	2.645	2.710	2.745	2.790	2.835	2.895
1060	thru	1085	8	2.600	2.645	2.710	2.745	2.790	2.835	2.895	2.965
1090	thru	1115	9	2.645	2.710	2.745	2.750	2.835	2.895	2.965	3.035
1120	thru	1150	10	2.710	2.745	2.790	2.835	2.895	2.965	3.035	3.120
1155	thru	1185	11	2.745	2.790	2.835	2.895	2.965	3.035	3.120	3.205
1190	thru	1220	12	2.790	2.835	2.895	2.965	3.035	3.120	3.205	3.295
1225	thru	1260	13	2.835	2.895	2.965	3.035	3.120	3.205	3.295	3.380
1265	thru	1300	14	2.895	2.965	3.035	3.120	3.205	3.295	3.380	3.475
1305	thru	1340	15	2.965	3.035	3.120	3.205	3.295	3.380	3.475	3.580
1345	thru	1380	16	3.035	3.120	3.205	3.295	3.380	3.475	3.500	3.705
1385	thru	1420	17	3.120	3.205	3.295	3.380	3.475	3.580	3.705	3.830
1425	thru	1460	18	3.205	3.295	3.380	3.475	3.580	3.705	3.830	3.965

Exhibit T-9 to Plaintiff's Exhibit 6.

Exhibit T-10 to Plaintiff's Exhibit 6.

SCHEDULE FOR
DERIVING RATE RANGES AND STEPS
WELLSBORO
Cancels Sheet Effective November 1, 1967
Effective November 4, 1968

Grp. No. New	Trainee Starting Rate	Min.	RATE SCHEDULE 2nd	Midpoint	4th	Max.
1			$2.425 a	$2.455 b	$2.50	$2.54
2			2.455 a	2.50 b	2.54	2.585
3			2.50 a	2.54 b	2.585	2.64
4			2.54 a	2.585 b	2.64	2.69 c
5		$2.54 a	2.585 b	2.64	2.69	2.755
6	$2.54 a	2.585 b	2.64	2.69	2.755	2.815
7	2.54 a	2.64	2.69	2.755	2.815	2.875
8	2.54 a	2.69	2.755	2.815	2.875	2.945
9	2.585 b	2.755	2.815	2.875	2.945	3.015
10	2.64	2.815	2.875	2.945	3.015	3.10
11	2.69	2.875	2.945	3.015	3.10	3.185
12	2.755	2.945	3.015	3.10	3.185	3.285
13	2.815	3.015	3.10	3.185	3.285	3.36
14	2.875	3.10	3.185	3.285	3.36	3.445
15	2.945	3.185	3.285	3.36	3.445	3.54
16	3.015	3.285	3.36	3.445	3.54	3.63
17	3.10	3.36	3.445	3.54	3.63	3.715
18	3.185	3.445	3.54	3.63	3.715	3.82

a) Time progression increase due after one (1) month at this rate.

b) Time progression increase due after three (3) months at this rate.

c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/cp
1-14-69

Exhibit T-11 to Plaintiff's Exhibit 6.

SCHEDULE FOR
DERIVING RATE RANGES AND STEPS
WELLSBORO
Cancels Sheet Effective November 1, 1966
Effective November 1, 1967

Grp. No. New	Trainee Starting Rate	RATE SCHEDULE Min.	2nd	Midpoint	4th	Max.
1			$2.225 a	$2.255 b	$2.30	$2.34
2			2.255 a	2.30 b	2.34	2.385
3			2.30 a	2.34 b	2.385	2.44
4			2.34 a	2.385 b	2.44	2.49 c
5		$2.34 a	2.385 b	2.44	2.49	2.55
6	$2.34 a	2.385 b	2.44	2.49	2.55	2.605
7	2.34 a	2.44	2.49	2.55	2.605	2.66
8	2.34 a	2.49	2.55	2.605	2.66	2.725
9	2.385 b	2.55	2.605	2.66	2.725	2.79
10	2.44	2.605	2.66	2.725	2.79	2.87
11	2.49	2.66	2.725	2.79	2.87	2.95
12	2.55	2.725	2.79	2.87	2.95	3.04
13	2.605	2.79	2.87	2.95	3.04	3.11
14	2.66	2.87	2.95	3.04	3.11	3.19
15	2.725	2.95	3.04	3.11	3.19	3.28
16	2.79	3.04	3.11	3.19	3.28	3.36
17	2.87	3.11	3.19	3.28	3.36	3.44
18	2.95	3.19	3.28	3.36	3.44	3.535
19	3.04	3.28	3.36	3.44	3.535	3.645
20	3.11	3.36	3.44	3.535	3.645	3.74
21	3.19	3.44	3.535	3.645	3.74	3.84
22	3.28	3.535	3.645	3.74	3.84	3.95
23	3.36	3.645	3.74	3.84	3.95	4.06

a) Time progression increase due after one (1) month at this rate.

b) Time progression increase due after three (3) months at this rate.

c) On transfer to an equal or lower rated job:

1. An employe in or below this rate range will receive credit for service toward his six (6) month control period for merit progression.

2. An employe at or above this rate should not be reduced below it except to the highest rate in the rate range.

GHB/k
10-20-67

Exhibit T-12 to Plaintiff's Exhibit 6.

WELLSBORO
CONVERSION SCHEDULE

Cancels: 11/1/66
Effective: 11/1/67

REGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
1	2.225		2.34
2	2.255		2.385
3	2.30		2.44
4	2.34		2.49
5	2.34		2.55
6	2.34	2.385	2.605
7	2.34	2.44	2.66
8	2.34	2.49	2.725
9	2.385	2.55	2.79
10	2.44	2.605	2.87
11	2.49	2.66	2.95
12	2.55	2.725	3.04
13	2.605	2.70	3.11
14	2.66	2.87	3.19
15	2.725	2.95	3.28
16	2.79	3.04	3.36
17	2.87	3.11	3.44
18	2.95	3.19	3.535
19	3.04	3.28	3.645
20	3.11	3.36	3.74
21	3.19	3.44	3.94
22	3.28	3.535	3.95
23	3.36	3.645	4.06

IRREGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
4.2		2.44	2.49
11.1		2.79	2.95
13.3		2.87	3.11
15.2		2.95	3.20
15.3		3.04	3.28
17.1		3.11	3.44
17.3		3.19	3.44
18.1		3.19	3.535

GHB/mmt
October 2, 1967

Exhibit T-13 to Plaintiff's Exhibit 6.

SCHEDULE
FOR
DERIVING RATE RANGES AND STEPS

WELLSBORO
Cancels Sheet Effective November 1, 1965
Effective November 1, 1966

Grp. No. New	Trainee Starting Rate	Rate Schedule				
		Minimum	2nd	Midpoint	4th	Maximum
1	$	$	$2.14 (a)	$2.17 (b)	$2.21	$2.25
2			2.17 (a)	2.21 (b)	2.25	2.295
3			2.21 (a)	2.25 (b)	2.295	2.345
4			2.25 (a)	2.295 (b)	2.345	2.395
5		2.25 (a)	2.295 (b)	2.345	2.395	2.45
6	2.25 (a)	2.295 (b)	2.345	2.395	2.45	2.505
7	2.25 (a)	2.345	2.395	2.45	2.505	2.56
8	2.25 (a)	2.395	2.45	2.505	2.56	2.62
9	2.295 (b)	2.45	2.505	2.56	2.62	2.685
10	2.345	2.505	2.56	2.62	2.685	2.76
11	2.395	2.56	2.62	2.685	2.76	2.835
12	2.45	2.62	2.685	2.76	2.835	2.835
13	2.505	2.685	2.76	2.835	2.925	2.835
14	2.56	2.76	2.835	2.925	2.99	3.065
15	2.62	2.835	2.925	2.99	3.065	3.155
16	2.685	2.925	2.99	3.065	3.155	3.23
17	2.76	2.99	3.065	3.155	3.23	3.31
18	2.835	3.065	3.155	3.23	3.31	3.40
19	2.925	3.155	3.23	3.31	3.40	3.505
20	2.99	3.23	3.31	3.40	3.505	3.595
21	3.065	3.31	3.40	3.505	3.595	3.69
22	3.155	3.40	3.505	3.595	3.69	3.80
23	3.23	3.505	3.595	3.69	3.80	3.905

(a) Time progression increase due after one (1) month at this rate.

(b) Time progression increase due after three (3) months at this rate.

GHB/mmt
10/20/66

Exhibit T-14 to Plaintiff's Exhibit 6.

WELLSBORO

CONVERSION SCHEDULE

Cancels: 11/1/65
Effective: 11/1/66

REGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
1	2.14		2.245
2	2.17		2.29
3	2.21		2.345
4	2.25		2.395
5	2.25		2.45
6	2.25	2.29	2.505
7	2.25	2.345	2.56
8	2.25	2.395	2.62
9	2.29	2.45	2.685
10	2.345	2.505	2.76
11	2.395	2.56	2.835
12	2.45	2.62	2.925
13	2.505	2.685	2.99
14	2.56	2.76	3.065
15	2.62	2.835	3.155
16	2.685	2.925	3.23
17	2.76	2.99	3.31
18	2.835	3.065	3.40
19	2.925	3.155	3.505
20	2.99	3.23	3.595
21	3.065	3.31	3.69
22	3.155	3.40	3.80
23	3.23	3.505	3.905

IRREGULAR SCHEDULE

Gp. #	Tr.	Min.	Max.
4.2		2.345	2.395
11.1		2.685	2.835
13.3		2.76	2.99
15.2		2.835	3.155
15.3		2.925	3.155
17.1		2.99	3.31
17.3		3.065	3.31
18.1		3.065	3.40

GHB/ck
October 14, 1966

Exhibit T-15 to Plaintiff's Exhibit 6.

SCHEDULE
FOR
DERIVING RATE RANGES AND STEPS
WELLSBORO
Cancels Sheet Effective January 18, 1965
Effective November 1, 1965
RATE SCHEDULE

Gr. # New	Trainee	Min.	2nd	Mid.	4th	Max.
1	2.08 (a)			2.11 (b)	2.15	2.19
2	2.11 (a)			2.15 (b)	2.19	2.235
3	2.15 (a)			2.19 (b)	2.235	2.285
4	2.19 (a)			2.235 (b)	2.285	2.335
5	2.19 (a)		2.235 (b)	2.285	2.335	2.39
6	2.19 (a)	2.235 (b)	2.285	2.335	2.39	2.445
7	2.19 (a)	2.285	2.335	2.39	2.445	2.50
8	2.19 (a)	2.335	2.39	2.445	2.50	2.56
9	2.235 (b)	2.39	2.445	2.50	2.56	2.625
10	2.285	2.445	2.50	2.56	2.625	2.70
11	2.335	2.50	2.56	2.625	2.70	2.775
12	2.39	2.56	2.625	2.70	2.775	2.865
13	2.445	2.625	2.70	2.775	2.865	2.93
14	2.50	2.70	2.775	2.865	2.93	3.005
15	2.56	2.775	2.865	2.93	3.005	3.095
16	2.625	2.865	2.93	3.005	3.095	3.17
17	2.70	2.93	3.005	3.095	3.17	3.25
18	2.775	3.005	3.095	3.17	3.25	3.34
19	2.865	3.095	3.17	3.25	3.34	3.445
20	3.93	3.17	3.25	3.34	3.445	3.535
21	3.005	3.25	3.34	3.445	3.535	3.63
22	3.095	3.34	3.445	3.535	3.63	3.74
23	3.17	3.445	3.535	3.63	3.74	3.845

(a) Time progression increase due after one (1) month at this rate.
(b) Time progression increase due after three (3) months at this rate.

GHB:lh
January 17, 1966

Exhibit T-16 to Plaintiff's Exhibit 6.

CONVERSION SCHEDULE
Cancels Sheet Effective January 18, 1965
Effective November 1, 1965
Wellsboro

REGULAR SCHEDULE

Gr. #	Tr.	Min.	Max.
1	2.08		2.185
2	2.11		2.23
3	2.15		2.285
4	2.19		2.335
5	2.19		2.39
6	2.19	2.23	2.445
7	2.19	2.285	2.50
8	2.19	2.335	2.56
9	2.23	2.39	2.625
10	2.285	2.445	2.70
11	2.335	2.50	2.775
12	2.39	2.56	2.865
13	2.445	2.625	2.93
14	2.50	2.70	3.005
15	2.56	2.775	3.095
16	2.625	2.865	3.17
17	2.70	2.93	3.25
18	2.775	3.005	3.34
19	2.865	3.095	3.445
20	2.93	3.17	3.535
21	3.005	3.25	3.63
22	3.095	3.34	3.74
23	3.17	3.445	3.845

IRREGULAR SCHEDULE

Gr. #	Tr.	Min.	Max.
4.2		2.285	2.335
11.1		2.625	2.775
13.3		2.70	2.93
15.2		2.775	3.095
15.3		2.865	3.095
17.1		2.93	3.25
17.3		3.005	3.25
18.1		3.005	3.34

GHB:lh
January 17, 1966

Exhibit T-17 to Plaintiff's Exhibit 6.

HOURLY GROUP NUMBER CONVERSION TABLE

WELLSBORO PLANT

IRREGULAR SCHEDULE			REGULAR SCHEDULE		
Present Group Number		New Group Number	Present Group Number		New Group Number
Male	Female		Male	Female	
				1,2,3&4A	1
				5A	2
			1	6A	3
	7.2A	4.2	2	7,& 8A	4
			3		5
			4		6
			5		7
9.1 & Above		Add 2 to present Group Number.	& Above		Add 2 to present Group Number.

SJM/pb
January 14, 1965

Exhibit T-18 to Plaintiff's Exhibit 6.

SCHEDULE
FOR
DERIVING RATE RANGES AND STEPS
WELLSBORO, PENNSYLVANIA
Cancels Sheet Effective November 2, 1964
Effective January 18, 1965

Gp.No. New	Trainee	RATE SCHEDULE Min.	2nd	Mid.	4th	Max.
1	$1.98 (a)			$2.01 (b)	$2.05	$2.09
2	2.01 (a)			2.05 (b)	2.09	2.135
3	2.05 (a)			2.09 (b)	2.135	2.185
4	2.09 (a)			2.135 (b)	2.185	2.235
5	2.09 (a)		$2.135 (b)	2.185	2.235	2.285
6	2.09 (a)	$2.135 (b)	2.185	2.235	2.285	2.34
7	2.09 (a)	2.185	2.235	2.285	2.34	2.39
8	2.09 (a)	2.235	2.285	2.34	2.39	2.45
9	2.135 (b)	2.285	2.34	2.39	2.45	2.51
10	2.185	2.34	2.39	2.45	2.51	2.585
11	2.235	2.39	2.45	2.51	2.585	2.655
12	2.285	2.45	2.51	2.585	2.655	2.74
13	2.34	2.51	2.585	2.655	2.74	2.805
14	2.39	2.585	2.655	2.74	2.805	2.875
15	2.45	2.655	2.74	2.805	2.875	2.96
16	2.51	2.74	2.805	2.875	2.96	3.035
17	2.585	2.805	2.875	2.96	3.035	3.11
18	2.655	2.875	2.96	3.035	3.11	3.195
19	2.74	2.96	3.035	3.11	3.195	3.295
20	2.805	3.035	3.11	3.195	3.295	3.385
21	2.875	3.11	3.195	3.295	3.385	3.475
22	2.96	3.195	3.295	3.385	3.475	3.58
23	3.035	3.295	3.385	3.475	3.58	3.68
24						
25						
26						
27						

(a) Time progression increase due after one (1) month at this rate.
(b) Time progression increase due after three (3) months at this rate.

/pb
January 14, 1965

Exhibit T-19 to Plaintiff's Exhibit 6.

CONVERSION SCHEDULE

Cancels sheet dated November 2, 1964

Effective Janurary 18, 1965

IRREGULAR SCHEDULE				REGULAR SCHEDULE			
Grp.	Train.	Min.	Max.	Grp.	Train.	Min.	Max.
				1	1.98		2.09
				2	2.01		2.135
				3	2.05		2.185
4.2		2.185	2.235	4	2.09		2.235
				5	2.09		2.285
				6	2.09	2.135	2.34
				7	2.09	2.185	2.39
				8	2.09	2.235	2.45
				9	2.135	2.285	2.51
				10	2.185	2.34	2.585
11.1		2.51	2.655	11	2.235	2.39	2.655
				12	2.285	2.45	2.74
13.3		2.585	2.805	13	2.34	2.51	2.805
				14	2.39	2.585	2.875
15.2		2.655	2.96	15	2.45	2.655	2.96
15.3		2.74	2.96	16	2.51	2.74	3.035
				17	2.585	2.805	3.11
17.1		2.805	3.11	18	2.655	2.875	3.195
				19	2.74	2.96	3.295
17.3		2.875	3.11	20	2.805	3.035	3.385
				21	2.875	3.11	3.475
18.1		2.875	3.195	22	2.96	3.195	3.58
				23	3.035	3.295	3.68

Exhibit T-20 to Plaintiff's Exhibit 6.

MALE SCHEDULE FOR
DERIVING RATE RANGES AND STEPS
Cancels Sheet Effective 1/20/64
Effective November 2, 1964

Wage Gp. No.	Job. Eval. Points	Trainee Hourly Starting Rate	Min. of Rate Range		Midpt.		Max. of Rate Range
1	Up to 160	$2.085		$	$	$2.13	$2.185
2	165-235	2.085			2.13	2.185	2.235
3	240-295	2.085		2.13	2.185	2.235	2.285
4	300-350	2.085	2.13	2.185	2.235	2.285	2.34
5	355-395	2.085	2.185	2.235	2.285	2.34	2.39
6	400-440	2.085	2.235	2.285	2.34	2.39	2.45
7	445-485	2.13	2.285	2.34	2.39	2.45	2.51
8	490-535	2.185	2.34	2.39	2.45	2.51	2.585
9	540-570	2.235	2.39	2.45	2.51	2.585	2.655
10	575-600	2.285	2.45	2.51	2.585	2.655	2.74
11	605-630	2.34	2.51	2.585	2.655	2.74	2.805
12	635-660	2.39	2.585	2.655	2.74	2.805	2.875
13	665-685	2.45	2.655	2.74	2.805	2.875	2.96
14	690-710	2.51	2.74	2.805	2.875	2.96	3.035
15	715-730	2.585	2.805	2.875	2.96	3.035	3.11
16	735-755	2.655	2.875	2.96	3.035	3.11	3.195
17	760-775	2.74	2.96	3.035	3.11	3.195	3.295
18	780-795	2.805	3.035	3.11	3.195	3.295	3.385
19	800-810	2.875	3.11	3.195	3.295	3.385	3.475
20	815-825	2.96	3.195	3.295	3.385	3.475	3.58
21	830-845	3.035	3.295	3.385	3.475	3.58	3.68
22	850-860	3.11	3.385	3.475	3.58	3.68	3.79
23	865-875	3.195	3.475	3.58	3.68	3.79	3.90
24	880-890	3.295	3.58	3.68	3.79	3.90	4.015
25	895-905	3.385	3.68	3.79	3.90	4.015	4.135
26	910-920	3.475	3.79	3.90	4.015	4.135	4.26

To: Mailing List No. 2—Hourly Rate Procedure

From: Employee Services
Industrial Relations Division

By: E. B. Lewis
/pb
10/12/64

Exhibit T-21 to Plaintiff's Exhibit 6.

FEMALE SCHEDULE FOR
DERIVING RATE RANGES AND STEPS
Cancels Sheet Effective 1/20/64
Effective November 2, 1964

Wage Gp. No.	Job. Ev. Points	Trainee Hourly Starting Rate	Min. of Rate Range		Midpt.		Max. of Rate Range
1	Up to 160	$1.98					$2.03
2	165-210	1.98				$2.03	2.05
3	215-235	1.98			$2.03	2.05	2.07
4	240-265	1.98		$2.03	2.05	2.07	2.09
5	270-295	1.98	$2.03	2.05	2.07	2.09	2.11
6	300-345	1.98	2.05	2.07	2.09	2.11	2.155
7	350-395	2.03	2.07	2.09	2.11	2.155	2.195
8	400-435	2.03	2.09	2.11	2.155	2.195	2.235
9	440-475	2.05	2.11	2.155	2.195	2.235	2.275
10	480-515	2.07	2.155	2.195	2.235	2.275	2.32
11	520-555	2.09	2.195	2.235	2.275	2.32	2.36
12	560-585	2.11	2.235	2.275	2.32	2.36	2.405
13	590-615	2.155	2.275	2.32	2.36	2.405	2.45

To: Mailing List No. 2—Hourly Rate Procedure

From: Employe Services
Industrial Relations Division

By: E. B. Lewis
/pb
10/12/64

Exhibit T-60 to Plaintiff's Exhibit 6.

Plants:
Main
Pot and Clay
Pressware
Fall Brook
Bradford
Wellsboro
Parkersburg

MALE SCHEDULE FOR DERIVING RATE RANGES AND STEPS

EFFECTIVE OCTOBER 20, 1947

Wage Gp. No.	Job Evalua. Points	Trainee Hourly Starting Rate	Inter-mediate Rate Setp	Min. Rate of Rate Range	Rate Steps			Max. Rate of Rate Range
1	Up to 160	.905					.955	1.005
2	165-235	.905				.955	1.005	1.055
3	240-295	.905			.955	1.005	1.055	1.105
4	300-350	.905		.955	1.005	1.055	1.105	1.155
5	355-395	.905		1.005	1.055	1.105	1.155	1.205
6	400-440	.905	.955	1.055	1.105	1.155	1.205	1.255
7	445-485	.955	1.005	1.105	1.155	1.205	1.255	1.31
8	490-535	1.005	1.055	1.155	1.205	1.255	1.31	1.37
9	540-570	1.055	1.103	1.205	1.255	1.31	1.37	1.425
10	575-600	1.105	1.155	1.255	1.31	1.37	1.425	1.485
11	605-630	1.155	1.205	1.31	1.37	1.425	1.485	1.54
12	635-660	1.205	1.255	1.37	1.425	1.485	1.54	1.60
13	665-685	1.255	1.31	1.425	1.485	1.54	1.60	1.665
14	690-710	1.31	1.37	1.485	1.54	1.60	1.665	1.725
15	715-730	1.37	1.425	1.54	1.60	1.665	1.725	1.78
16	735-755	1.425	1.485	1.60	1.665	1.725	1.78	1.85
17	760-775	1.485	1.54	1.665	1.725	1.78	1.85	1.925
18	780-795	1.54	1.60	1.725	1.75	1.85	1.925	1.995
19	800-810	1.60	1.665	1.78	1.85	1.925	1.995	2.065
20	815-825	1.665	1.725	1.85	1.925	1.995	2.065	2.145
21	830-845	1.725	1.78	1.925	1.995	2.065	2.145	2.23
22	850-860	1.78	1.85	1.995	2.065	2.145	2.23	2.315
23	865-875	1.85	1.925	2.065	2.145	2.23	2.315	2.395
24	880-890	1.925	1.995	2.145	2.23	2.315	2.395	2.49
25	895-905	1.995	2.065	2.23	2.315	2.395	2.49	2.585
26	910-920	2.065	2.145	2.315	2.395	2.49	2.585	2.68

Note: For use of Rate Dept., not distributed

Plants:
Main
Pot and Clay
Pressware
Fall Brook
Bradford
Wellsboro
Parkersburg

FEMALE SCHEDULE FOR DERIVING RATE RANGES AND STEPS

EFFECTIVE OCTOBER 20, 1947

Wage Gp. No.	Job Evaluation Points	Trainee Hourly Starting Rate	Intermediate Rate Step	Min. Rate of Rate Range	Rate Steps			Max. Rate of Rate Range
1	Up to 160	.805					.855	.855
2	165-210	.805				.855	.875	.875
3	215-235	.805			.855	.875	.895	.895
4	240-265	.805		.855	.875	.895	.915	.915
5	270-295	.805	.855	.875	.895	.915	.935	.935
6	300-345	.805	.875	.895	.915	.935	.975	.975
7	350-395	.855	.895	.915	.935	.975	1.015	1.015
8	400-435	.853	.915	.935	.975	1.015	1.055	1.035
9	440-475	.875	.935	.975	1.015	1.055	1.095	1.095
10	480-515	.895	.975	1.015	1.055	1.095	1.135	1.135
11	520-555	.915	1.015	1.055	1.095	1.135	1.175	1.175
12	560-585	.935	1.055	1.095	1.135	1.175	1.215	1.215
13	590-615	.975	1.095	1.135	1.175	1.215	1.255	1.255

Note: For use of Rate Department, not distributed

OPINION OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 69-396

MUIR, District Judge.

I. *INTRODUCTION.*

This suit was commenced by the Secretary of Labor on October 2, 1969, pursuant to 29 U.S.C. Section 201, *et seq.*, the Fair Labor Standards Act ("Equal Pay Act"). Plaintiff seeks to enjoin Defendant's alleged practice of wage discrimination based on sex and to obtain restitution of unpaid wages allegedly due certain female employees of Defendant.

II. *FINDINGS OF FACT.*

1. Corning Glass Works ("Corning") is a New York Corporation having its principal offices in Corning, New York. (Stip. of Fact 2)

2. The Wellsboro plant of Corning Glass Works is the only plant involved in this case. (Stip. of Fact 2)

3. There are four separate jobs involved in this litigation: Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector. (Stip. of Fact 6)

4. Prior to October 16, 1966, except during World War II, only female employees worked in these inspector positions on the day shifts at the Wellsboro plant. (Stip. of Fact 8)

5. Prior to October 16, 1966, except during World War II, only male employees worked in these inspector positions on the steady night shift in the Wellsboro plant. (Stip. of Fact 9)

6. In 1947, the differential in base hourly rates between the jobs of Inspector-Packer and Inspector-Packer Nights was 19 cents an hour, the differential in base hourly rates between the jobs of Frost Light Inspector and Frost Light Inspector Nights was 18 cents an hour, and the differential in base hourly rates between the jobs of Positioner-Inspector and Positioner-Inspector Nights was 19 cents an hour. (Stip. of Facts 36, 42, 45e)

7. On October 16, 1966, these respective differentials were 20 cents an hour, 16 cents an hour, and 20 cents an hour. (Stip. of Facts 37, 43, 45f)

8. The differential in base hourly rates between the jobs of Quality Inspector and Quality Inspector Nights has increased from 20 cents an hour in 1949 to 22.5 cents an hour on October 16, 1966. (Stip. of Facts 48, 49)

9. These differentials in base rate of pay were in addition to the plant-wide shift differential which has increased from 6 cents an hour in 1947 to 12 cents an hour in 1966 for steady night work. (Stip. of Facts 21-25)

10. Since October 16, 1966, by mutual agreement between the employees' certified bargaining agent and the Company, women have been permitted to exercise their seniority, on the same basis as male employees, to claim jobs on the steady night shift when vacancies occur and to bump into such jobs during periods when the work force is being reduced. (Stip. of Facts 19, 30, 38, 44, 45a, 79, 85-88, 118, 119)

11. Male and female inspectors who work on the steady night night shift inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 37, 72, 74, 89, 104)

12. Male and female inspectors who work on the day shifts on the inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 73, 90)

13. A night shift worker is out of phase with community life and is usually out of phase with family life. (3 N.T. 199-200)

14. Night work, both steady and rotating, interferes with the worker's physiological (circadian) rhythms. (3 N.T. 200)

15. The first job evaluation plan at Corning's Wellsboro plant was effective from October 20, 1947, to January 18, 1965, and was called the Stevenson, Jordan and Harrison Plan. It is referred to as the S J & H Plan. (Stip. of Fact to which Defendant Either Makes Objection or Withdraws a Prior Objection, P-39 at page 19)

16. The S J & H Plan measured jobs by weighing the following factors: schooling, training, skill, versatility,

knowledge, responsibility, surroundings, and hazards. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

17. Under the S J & H Plan, the ratings of these factors differed for each inspector job but the ratings of the surroundings and hazards factors were the same for the day and night shifts for each job. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

III. *DISCUSSION.*

Until October 16, 1966, except during World War II, only women worked as Frost Light Inspectors, Positioner-Inspectors, Inspector-Packers and Quality Inspectors on the day shift at the Wellsboro, Pennsylvania plant of Defendant Corning Glass Works and only men were permitted to work on the night shift.[1] Plaintiff contends that because the male inspectors on the night shift received a higher hourly base rate of pay than the female inspectors on the day shift, in addition to a plant-wide shift differential, Defendant violated 29 U.S.C. Section 206(d)(1) which provides:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by pay-

[1] Both parties agree that Plaintiff is barred from recovery for any possible violation prior to October, 1966, by the applicable statute of limitations. However, Plaintiff's claim that Defendant has violated 29 U.S.C. Section 206(d)(1) since that time is based on residual effects of the alleged prior discrimination. Accordingly, Plaintiff's case must fail if discrimination prior to October, 1966 is not proven.

ing wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In my view, Plaintiff has failed to sustain its burden of proof that the male and female inspectors performed their work "under similar working conditions." Male inspectors worked on the night shift; female inspectors on the day. Plaintiff contends that the time of day worked is not a "working condition" within the meaning of the statute. Plaintiff relies in part on testimony by Defendant's expert in the field of job evaluation that time of day worked is considered a wage condition, not a working condition. (3 N.T. 207, 211-212) Plaintiff also relies on the fact that the criteria evaluated under the job evaluation plans used by Defendant did not include time of day worked, and on selected legislative history. Defendant, on the other hand, points to Murphy v. Miller Brewing Company, 307 F.Supp. 829, 835 (E.D. Wisc. 1969) where the Court stated that

"(i)t is not subject to serious dispute that there is some difference in *working conditions* between the first,

> second, and third shifts merely because the work is performed at different times of the day." (Emphasis supplied).

In addition, Defendant too relies on legislative history to support its position. In my view, time of day worked is a working condition within the meaning of 29 U.S.C. Section 206(d)(1).[2] As Defendant's expert testified, night work has a significant sociological, psychological and physiological impact on most workers.[3] It is a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard. It is a condition under which most people would prefer not to work.

The question remains whether despite the difference in time of day worked, the day and night inspectors worked under working conditions which as a whole were similar. It appears that except for the time of day worked, their working conditions were the same.[4] In my view, a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not "very much alike" or "alike in substance or essentials."[5] Hence, Plaintiff has failed to prove a violation of 29 U.S.C. Section 206(d)(1).

---

[2] *Cf.* 29 C.F.R. Sec. 800.131-132; see also Independent Oil Workers Union, Local 117 v. American Oil Co., 296 F.Supp. 650, 658 (D. Kan. 1969).

[3] See Findings of Fact 13 and 14.

[4] See Findings of Fact 15-17.

[5] Webster's Third New International Dictionary, Unabridged, 1966.

IV. *CONCLUSIONS OF LAW.*

1. This Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiff has the burden of proving for each of the four inspector jobs involved in this case that male and female inspectors labored under similar working conditions but were not paid equal wages for equal work.

3. Work performed on the night shift is not performed under working conditions similar to work performed on the day shifts.

4. Since female inspectors worked on the day shifts and male inspectors worked on the night shift, Plaintiff has not sustained its burden of proof that male and female inspectors labored under similar working conditions.

5. Plaintiff has not proven any violation of 29 U.S.C. Section 206(d)(1).

An order in accordance with this Opinion will be entered.[6]

/s/ MUIR,
MUIR,
United States District Judge.

[Entered: March 30, 1972]

[6] In the event that the Court of Appeals for the Third Circuit should decide that my reasoning is erroneous. I have filed "Supplemental Findings of Fact." These are not necessary to my decision, but might be helpful to that court in reaching an opposite conclusion or might eliminate re-litigation of these issues if the case has to be re-tried.

SUPPLEMENTAL FINDINGS OF FACT OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 69-396.

A. Historical Background

1. Plaintiff claims a violation of the Equal Pay Act only with respect to employees who were hired prior to January 20, 1969. No violation is claimed at this time with respect to employees hired subsequent to January 20, 1969. (Stip. of Fact 121)

2. The steady night inspection jobs were created between 1925 and 1930 because of the introduction of automatic production equipment which made it necessary to inspect ware on all shifts. (Stip. of Fact 10)

3. At the time of the institution of inspection work on the night shift, and until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of 12:00 p. m. and 6:00 a. m. (Stip. of Fact 15). Thus, men had to be hired for this first night inspection shift.

4. These men were selected from male employees within the plant. (Stip. of Fact 13)

5. These men were paid the individual, personal rates they were already receiving which were higher than the rates being paid to women doing inspection work on the day shift. (Stip. of Fact 13)

6. At the time of the institution of inspection work on the night shift, Corning did not pay shift differentials. (Stip. of Fact 11)

7. During at least part of World War II, women were employed on the steady night shift as inspector-packers. (1 N. T. 203; 3 N. T. 132). There is no evidence that these women did or did not receive the same wages as the male inspector-packers working at night.

8. In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor (Act of May 21, 1947, P. L. 389, Sec. 4). The State regulations provided, among other things, that in order to be permitted to employ women at night an employer was required to furnish transportation where public transportation was not available. (Stip. of Fact 16)

9. Public transportation has not been available in Wellsboro, Pennsylvania. (Stip. of Fact 18)

10. It has not been economically feasible for Corning to furnish transportation to its female employees. (3 N. T. 195-196)

11. In 1944 the American Flint Glass Workers' Union of North America negotiated a collective bargaining agree-

ment covering many production and maintenance employees of Corning Glass Works, Wellsboro plant, including the inspectors who worked on the inspection jobs involved in this case. (Stip. of Fact 21)

12. This contract provided that, for the first time, all employees working a non-rotating night shift would receive a shift differential as a premium for such night work. (Stip. of Facts 22 and 23)

13. In addition to this new "shift differential" applicable to all night workers, this contract continued in effect the existing differential in base rate of pay between the employees on the steady night shift *inspection* jobs and employees on the day and afternoon shift *inspection* jobs. (Stip. of Fact 23)

14. All collective bargaining agreements entered into by Corning with the Union, between the years 1944 and 1969 continued to maintain the differential in base rate between the steady night shift inspection jobs and the day and afternoon shift inspection jobs, except for minor variations caused by the negotiation of percentage rather than flat rate increases. (Stip. of Fact 24)

15. The following jobs were performed exclusively by men on all shifts at least until October 17, 1966:

Job Code	*Job Title*	*Group No.*
1836	Industrial Truck & Equipment Opr.	7
2015	Head Mixer	10
4007	Glass Melting Furnace Operator	11
4031	Optical Reader Forehearth & Lehr Opr.	14
2181	Cng. Rbn. Mch. Operator—Class B	14
2184	Relief Attendant	10

2280	Cng. Rbn. Mch. Operator—Class A	18
1053	Hiker	3
3838	Traying Machine Operator	5
4457	Frost Operator	8
4466	Misc. Frost Operator	9
3608	Opr. Cut & Finishing Machine	9
3716	Ceramic & S & L Operator	9
5711	Sahara Operator	9
5739	Finishing Equipment Mechanic	11
0850	Ind. Truck Driver & checker	8
5728	Shift Maintenance Mechanic	13
6213	Electrician—Class A	16
6214	Electrician—Class B	12
5224	Packing Equipment Operator	7
5287	Attendant Hamper Maker & Sealer	4

(Plaintiff's Exhibit 1, p. 13)

16. With respect to these jobs, the base hourly rate has been the same on all shifts. (Plaintiff's Exhibit 1, p. 13)

17. On July 17, 1965, the State regulations were amended to provide that an employer in a manufacturing establishment could employ women between the hours of 10:00 p. m. and 6:00 a. m. if that employer arranged for adequate transportation for women workers or if prompt public transportation was available or the individual worker had regular private transportation. CCH State Wage and Hour Citator Paragraph 57,849. (Stip. of Fact 17)

18. Beginning on October 16, 1966, Corning has employed women between the hours of 12 midnight and 6:00 a. m. without providing transportation. To the best of Defendant's knowledge, these employees have regular private transportation. (Stip. of Fact 19)

Supplemental Findings of Fact of the District Court.

19. The job of Positioner-Inspector on the night shift was eliminated on September 11, 1966, and since that time it has been performed only on the day shift. (Stip. of Fact 53; cf. Stip. of Fact 45f)

B. Differences Between the Night and Day Inspector Shifts

20. The primary duties of men and women working as Inspector-Packers, Positioner-Inspectors, Frost Light Inspectors and Quality Inspectors do not depend on which shift is being worked. (Stip. of Facts 33, 41, 45d, 46; 1 N. T. 7-8, 128, 143-150, 156-158, 164-193; 2 N. T. 44-65, 86-90, 93-94, 95-98, 103-108, 112-120; 3 N. T. 105-106, 134-136, 139-140, 147-154, 155-185, 189-192, 194)

21. Male inspectors on the steady night shift have performed additional duties requiring substantially greater physical effort, including heavy lifting and pushing, than jobs having the same titles on the day shifts. Only men have performed such duties, and most women could not perform many of these duties. (Stip. of Facts 34, 35, 64; 1 N. T. 170-184, 193, 198; 2 N. T. 104-109, 112-116, 197-213, 215-235; 3 N. T. 104-105, 108, 135-140, 149, 155-164, 168-172; Defendant's Exhibits D1-D85)

22. These duties are not included in the duties of these jobs on the day shifts. (2 N. T. 106-107, 215-216, 226-227).

23. On the day shifts, these duties are usually performed by "Hikers," traditionally males. (Stip. of Fact 66)

24. On October 16, 1966, the maximum base rate of pay for Hikers was higher than for night shift inspectors but

lower than that for day inspectors (excluding shift differentials). (Stip. of Facts 75, 45f, 43, and 37)

25. On the day shifts, male inspectors who are called upon to perform the job of Hiker carry a multiple rate and receive the rate for the job of Hiker when performing the job of Hiker. This is also true of any male inspectors on the night shift with seniority after January 20, 1969, but not of male inspectors on the night shift hired prior to January 20, 1969, who continue to receive their inspection rate even when performing Hiker duties. (Stip. of Fact P-112 at page 24)

26. The heavy aspects of the Hiker job are lightened to the extent necessary by assigning as many men as are needed to accomplish it (2 N. T. 198-203; 3 N. T. 44, 183); by using mechanical aids (2 N. T. 198-202, 226; 3 N. T. 42, 183-184); and by rotating the men between the tiring duties and the lighter duties. (2 N. T. 223)

27. There are approximately the same number of hikers on all shifts. Three to 13 men work as Hikers assisting inspectors on the morning and afternoon shifts. Three to 13 men work as Hikers assisting inspectors on the night shift. (Stip. of Fact 67; 3 N. T. 35)

28. The amount of time male inspectors on the steady night shift spend performing heavy manual labor varies from day to day and from person to person. (Defendant's Exhibits D1-D85)

29. Male inspectors on the night shift have spent about 25 to 30% of their time doing manual labor, heavy and light. (3 N. T. 104-108, 111, 138-139)

30. Some of the time which these male inspectors on the night shift spent performing manual labor was due to an excess of inspectors on that shift. (1 N. T. 189)

31. Although there is a wide variance from day to day and from person to person in the amount of time male inspectors on the night shift spend performing manual labor, they are all always paid at the same base hourly rate (aside from considerations of seniority) without regard to the nature and frequency of their performance of manual labor. (Stip. of Facts 37, 43, 45f)

32. A male inspector on the night shift who at times has been physically unable, due to illness, to perform the heavier aspects of Hiker work has not had his pay reduced. (2 N. T. 93-94)

33. Since October 16, 1966, when women first were permitted to apply for night shift inspector jobs, they have not had to perform manual labor at night. (2 N. T. 235)

34. During interruptions, at times, some inspectors on all shifts are assigned to the reinspection belt. The reassigned female inspectors and some of the reassigned male inspectors on all shifts engage in inspecting and repacking the ware at the belt. The inspection at this belt is primarily for broken bulbs. This is work within the Inspector-Packer job classification. (Stip. of Fact 63)

35. In addition, the female employees who have performed the inspector jobs involved in this case since October 2, 1966, generally have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than their inspector job.

36. Women inspectors are occasionally required to lift boxes weighing 30 pounds or more. (3 N. T. 161)

37. The only differences between the jobs of Quality Inspector and Quality Inspector Nights is that the latter generally (1) make the final decision to withhold glass or let it pass without consulting with a foreman; and (2) set their own machines in case of changeover. (1 N. T. 7-8, 3 N. T. 189-194)

C. Job Evaluation Plans

38. Under the Corning Glass Works (CGW) Plan of job evaluation, which was installed on January 20, 1969, all employees hired after January 20, 1969, are paid the evaluated base wage rate for that job without regard to whether they work at night or during the day or whether they are men or women. (Stip. of Fact 101)

39. From October 20, 1947, to January 17, 1965, Defendant maintained separate rate schedules for males and for females. (Stip. of Fact P-60 at page 21)

40. Until October 16, 1966, Defendant maintained separate seniority lists for males and females. (Stip. of Fact 77)

41. Under the separate rate schedules for men and women, male inspectors working the steady night shift were paid a higher base hourly rate than the day and afternoon female inspectors who performed work rated at the same points by Defendant's SJ&H Plan. (T-20, 21, 60 and 61 to Plaintiff's Exhibit G)

42. The SJ&H plan provided for calculating the basic wage rate for men by converting the total values of the

jobs evaluated under the plan to a rating factor and multiplying the rating factor by the unskilled labor rate of the vicinity for men. The same procedure was followed for calculating the basic wage rates for women except the unskilled labor rate of the vicinity for women was used to obtain the female rate. (Page 13 of Exhibit J to Plaintiff's Exhibit 1)

43. Effective, January 18, 1965, Defendant merged the separate male and female schedules into one revised rate schedule. (Stip. of Fact P-69 at page 22)

44. This merger, however, preserved the differentials in maximum base rate between the male and female inspectors. Some of the subordinate rates were changed very slightly. (Stip. of Facts 37, 43 45f and 49; pages 192-194 of Plaintiff's Exhibit 6)

45. Under the CGW plan, the wage rate is the same on all three shifts and for both sexes for all inspectors hired after January 20, 1969. (Stip. of Fact 102)

D. Effect of the Changes since October 16, 1966, on Wages Paid to Inspectors

46. Women must wait for vacancies in night shift jobs to occur unless they bump into such jobs in the event of a reduction in force. (Stip. of Fact 44)

47. In the event of a force reduction in a particular job, employees on the job for less than 84 days are dismissed first from that job, in order of plantwide seniority. (Stip. of Fact P-83 at page 22)

48. Beginning October 16, 1966, a number of female employees have availed themselves of the opportunity to

take the higher-paying night shift inspection jobs. (Stip. of Facts 80 and 88)

49. Several females who were first hired on March 14, 1967, immediately began work as Inspector-Packers on the steady night shift that same night. (4 N. T. 10-11)

50. A male who was hired on September 20, 1966, began work as a Frost Light Inspector on the steady night shift on June 10, 1967. (4 N. T. 12)

51. Another male, hired on May 9, 1966, began work as a Quality Inspector on the steady night shift on March 31, 1967. (4 N. T. 12)

52. All qualified employees of the Wellsboro plant who had greater seniority than the employees listed in the previous three paragraphs could have claimed the steady night shift inspection jobs on the dates those employees began work on those jobs. (4 N. T. 13-16)

53. Since 1944 every collective bargaining agreement has contained Article 15, section 2, which provides:

> "When job evaluation • • • results in wage brackets lower than prevailing rates then paid for the job it is not the intention of the company to reduce the prevailing base rates of employees currently working on such jobs." (Stipulation 108)

54. Paragraph 9 of Schedule A of the installation rules of the CGW Plan provides:

> "Any employee who as of the date of the installation of the CGW Hourly Job Evaluation Plan is an employee of the Wellsboro plant covered by the terms of the Basic Agreement and who thereafter by operation

of rights under the Basic Agreement continues to hold or takes any of the jobs specified on the (night) shift shall receive the rate which he or she would have received for that work under pre-existing practices. Those jobs being:

Inspector-Packer (N)
Positioner-Inspector (N)
Frost Light Inspector (N)
Quality Inspector (N)

Persons who become employees after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs." (Stipulation 109)

55. The rates paid under paragraph 9 of Schedule A are called "red-circle" rates by Corning. (Stipulation 111)

56. Because of these "red-circle" rates, all inspectors (male and female) employed before January 20, 1969 working on the steady night shift receive a higher base wage rate than their counterparts of comparable seniority working on the day shifts. (Stip. of Facts 103, 104)

57. This "red-circle" rate will not be paid to employees hired after January 20, 1969. (Stip. of Facts 113)

58. Since October 16, 1966, a few male inspectors have taken day and afternoon inspection jobs with concomitant reduced base hourly rate. (Stip of Facts 117, 73, 37, 43, 45f and 49)

E. Wilfullness

59. At least since May 4, 1964, Defendant has been aware of the Equal Pay Act because on that date, one of Defendant's attorneys advised Wellsboro officials of the Act and its implications, and told them to refer any possible violations to officials in Corning, New York. (Stip. of Fact P-6 at page 5)

60. On January 24, 1966, Corning was advised by an investigator for the Department of Labor that Defendant was in violation of the Equal Pay Act at its main plant in Corning, New York, in that female inspectors on the day shifts were being paid lower base hourly rates than their male counterparts on the night shift. The investigator stated that the Department's position was that the base hourly rates of the women should be raised to that of the men and restitution paid. (Stip. of Fact P-11 at page 6)

/s/ MALCOLM MUIR,
United States District Judge.

Dated: March 30, 1972

JUDGMENT OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil Action No. 69-396.

ORDER

Judgment is hereby entered in favor of Defendant and against Plaintiff. Plaintiff's request for an injunction enjoining alleged violations of Sections 15(a) (1) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U.S.C. Sections 201-219, and for withholding of payment of wages allegedly due Defendant's employees under the Act, is hereby denied.

/s/ MUIR,
United States District Judge.

[Entered, March 30, 1972]

OPINION OF THE COURT OF APPEALS.

(Filed Jun. 28, 1973.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1590.

PETER BRENNAN, Secretary of Labor, United States Department of Labor,

Appellant,

v.

CORNING GLASS WORKS, a corporation,

Appellee.

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D. C. Civil No. 69-396).

Argued Monday, May 21, 1973.

Before: KALODNER, ALDISERT and ADAMS,
Circuit Judges.

Richard F. Schubert,
Solicitor of Labor,
Carin Ann Clauss,
Associate Solicitor,
Donald S. Shire,
Helen W. Judd,
Isabelle R. Cappello,
Attorneys,
U. S. Department of Labor,
Washington, D. C.
Sylvia S. Ellison,
Attorney,
Louis Weiner,
Regional Solicitor.

Scott F. Zimmerman,
Walter P. DeForest,
Reed Smith Shaw & McClay,
Pittsburgh, Penna. 15219,
Robert F. Cox,
Cox, Wilcox, Owlett & Lewis,
Wellsboro, Penna. 16901,
Counsel for Appellee,
Corning Glass Works.

ADAMS, *Circuit Judge:*

This action was commenced by the Secretary of Labor to enjoin claimed violations of the equal pay provisions of the Fair Labor Standards Act[1] and to restrain the withholding of wages allegedly due certain female employees. The broad issue presented for the Court's judgment is whether Corning Glass Works engaged in wage discrimination violative of the Equal Pay Act[2] by paying more to *night* inspectors than to *day* inspectors at its Wellsboro, Pennsylvania plant.

The basic factual pattern involved in this case implicates the Equal Pay Act because, for reasons that will be fully explained, *infra,* before October 16, 1966, night inspection work was performed exclusively by males and day

---

[1] 29 U.S.C. § 201 *et seq.*

[2] The equal pay provisions were added to the Fair Labor Standards Act as an amendment to § 6(d) of the Act. Enacted by Congress in 1963 to correct certain conditions considered contrary to the country's interest, the Equal Pay Act provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or equality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d) (1).

inspection work largely by females. Thus, the Secretary asserts, in essence, that Corning paid male night inspectors more than female day inspectors for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."[3] the district court disagreed, and the case is now here on appeal.

I.

The pay practices at the heart of this controversy developed over a period spanning more than forty-five years. Before 1925, Corning operated its Wellsboro Plant only during the day, finding it either unnecessary or undesirable to employ a night shift. All inspection work at that time was performed by women. The introduction of automated production equipment between 1925 and 1930, however, made it necessary or desirable for the first time to use night shifts.

Until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of midnight and 6:00 A.M.,[4] and thus, in order to fill inspector positions on the new steady night shift, Corning had to hire men. These night inspectors, selected from male employees within the plant, were paid for their night inspection work the individual rates they had previously been receiving. Such wages were higher than the rates paid to women engaged as inspectors on the day shift. A situation thus developed in which male inspectors worked at night, female

[3] 29 U.S.C. § 206(d) (1).

[4] Act of July 25, 1913, P. L. 1024.

inspectors during the day, and the male employees were paid at higher rates.[5]

This wage differential was reinforced when, in 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of Corning's Wellsboro Plant and negotiated a collective bargaining agreement providing, for the first time, a plant-wide night shift differential. Despite this new *shift* differential, serving as a premium for night work, the pre-existing *wage* difference between night shift inspectors and day shift inspectors continued in effect.[6]

In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor.[7] Under the applicable regulations, however, Corning could have employed women at night only if it would provide them transportation or if Wellsboro had public transportation. It was not economically feasible for Corning to furnish transportation to its female employees, and public transportation was unavailable. The 1947 state regulations were later amended in July, 1965 to permit night work for those women who had regular, private transportation.[8]

---

[5] After installation of the Stevenson, Jordon & Harrison wage evaluation plan in 1947, for example, the resulting wage differentials between the night and day shifts amounted to a high of 19 cents an hour, in addition to the shift differential of 4 cents an hour for the afternoon shift and 10 cents an hour for the night shift. By 1966, the highest base wage differential was 22½ cents an hour.

[6] See note 5, *supra*.

[7] Act of May 21, 1947, P. L. 389, § 4.

[8] CCH State Wage and Hour Citator ¶57,849.

Since October 16, 1966, by mutual agreement between the union and Corning, women have been permitted to exercise their seniority, on the same basis as men, to claim steady night shift jobs when vacancies occur.[9] A considerable number of female employees have availed themselves of this opportunity to take the higher-paying night shift inspection jobs.[10] In addition, several new female employees, as well as a new male employee, have been hired to work as night inspectors.[11]

Thus, after October 16, 1966, female and male employees worked as inspectors on both the day and night shifts.

Male and female inspectors working the same shift have been and are paid at the same base hourly rate. Moreover, under the Corning Glass Works Plan of job evaluation installed on January 20, 1969, all employees hired *after* that date are paid the base wage rate for their job regardless of their sex or whether they work on the day or night shifts. The Corning Plan also provides for a "red circle" rate paid to persons employed *before* January 20, 1969, when working as night inspectors. Thus, all inspectors, male or female, who were employed before the date of the Corning

---

[9] They may also "bump" into such jobs during periods when the work force is being reduced.

[10] The parties stipulated that women filled 276 out of 395 openings on night inspection jobs between October 16, 1966 and June, 1970. Each of the 45 inspector jobs thus became available approximately 8 times during this four year period. No contention has been advanced that in filling these jobs Corning discriminated on the basis of sex.

[11] Several females just hired on March 14, 1967 immediately began inspection work on the steady night shift. In addition, some very junior male employees took steady night work. All qualified employees having greater seniority, whether male or female, could have claimed this work.

Plan and who work on the steady night shift receive a higher base wage rate ("red circle") than their counterparts, male or female, of comparable seniority, working on the day shifts.

II.

After finding the relevant facts, which were largely undisputed, and in any event mostly stipulated by the parties,[12] the district court held that the Secretary of Labor had not established that Corning violated the Equal Pay Act because he had "failed to sustain its burden of proof that the male inspectors on the night shift and the female inspectors on the day shift performed their work 'under similar working conditions,'" within the meaning of that phrase under the Equal Pay Act. The district court reasoned that "time of day worked is a working condition," and that "night work has a significant sociological, psychological and physiological impact on most workers."

Urging reversal of the district court's judgment, the Secretary contends primarily that: (1) in view of the legislative history of the Equal Pay Act and controlling judicial precedents, shift differences are not properly classified as "working conditions" under the statute's equal work standards; and (2) the work performed by men and women is "substantially" equal.

Needless to say, Corning disagrees with the Secretary's arguments as to "working conditions" in every respect. Moreover, the company seeks affirmance of the judgment of the district court on a number of additional, alternative

[12] The parties entered into more than 100 stipulations.

grounds: (a) if shift differentials are not "working conditions," within the meaning of the Act, they represent a "factor other than sex" upon which wage differentials may legally be based; (b) even assuming a prior violation of the equal pay provisions, Corning achieved compliance with the Act by opening all inspection jobs to both sexes in October, 1966; and (c) its allegedly unlawful conduct occurred prior to the period of the statute of limitations and cannot make illegal action within the period of the statute that is otherwise legal.

III.

Initially, the Court must determine whether the day and night inspection jobs constitute "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Upon this issue the Secretary carries the burden of proof,[13] and in determining whether the district court erred in concluding that such burden was not met, we must keep in mind that the Equal Pay Act does not contemplate that the Secretary of Labor and the courts will engage in job evaluation for the purpose of deciding what is a proper wage differential for unequal work.[14]

Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions,

---

[13] *E.g.*, Hodgson v. Corning Glass Works, 474 F. 2d 226, 231 (2d Cir. 1973); Schultz v. American Can Co., 424 F. 2d 356, 360 (8th Cir. 1970).

[14] *See* 109 Cong. Rec. 9197-98, 9209 (1965). Indeed, in view of the exceptions to the Act, it is clear that "Congress thus intended to allow [certain] wage differentials even though the contrasted employers (*sic*) were performing equal work." Hodgson v. Robert Hall Clothes, Inc., 473 F. 2d 589, 594 (3d Cir. 1973).

the employer, in order to prevail on the merits, must demonstrate that the wage differential is made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ."[15]

The basic issue over which the parties have waged their legal battle is whether time of day worked may properly be classified as a "working condition" within the meaning of the Act. Here, the district court held that steady night work is not performed under "working conditions" similar to day work. However, the Second Circuit recently concluded in Hodgson v. Corning Glass Works,[16] a case remarkably similar to the present one, that, in view of the legislative history of the Act, time of day worked may be used by an employer to justify claimed wage discrimination only as "a differential based on any other factor other than sex," but does not constitute a "working condition" so as to make the Act altogether inapplicable.

Writing for the court in *Hodgson,* Chief Judge Friendly, in concluding that a night shift is not a "working condition," relied in no small part[17] upon the following statement from the Committee Report:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation

[15] 29 U.S.C. § 201(d) (1).

[16] 474 F. 2d 226 (2d Cir. 1973).

[17] *Id.* at 232.

> of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded . . . ."[18]

In quoting this statement, the Second Circuit opinion interlineated the words "differentials based on any other factor other than sex" in brackets after the words the "broad general exclusion" in the next to last sentence in the quoted paragraph, thus revealing its belief that a "factor other than sex" is the "broad general exclusion" referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word "Thus," should therefore be construed as listing only examples of a "factor other than sex."

The specific examples that the Committee Report, in the last sentence, states would be excluded are "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability . . . ."[20]

---

[18] 109 Cong. Rec. 9210 (1963), U. S. Code Cong. & Admin. News, p. 689.

[19] 474 F. 2d at 232: "'As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has been also included.'"

[20] 109 Cong. Rec. 9210 (1963).

As a group, these examples cannot be interpreted as "factor[s] other than sex" for the simple reason that some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, "lifting or moving heavy objects" is, beyond dispute, an example of "effort," and "experience, training, or ability" are examples of "skill." And "effort" and "skill," along with "working conditions" and "responsibility," are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as "factor[s] other than sex"[21] to be considered as matters of defense.

Of course, our interpretation of the Committee Report—that the examples set forth are not *all* "factor[s] other than sex"—does not by itself suggest the converse—that they are *all* examples of "skill, effort, and responsibility, and . . . working conditions." Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (*i.e.*, effort, skill, responsibility, and working conditions) or solely from one of its defenses ("factor[s] other than sex"), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of day worked is a "working condition" or a "factor other than sex."

The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

---

[21] 29 U.S.C. § 206(d) (1).

"Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" (Emphasis supplied)[22]

Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an example and guideline as to the intent of Congress. Whatever may be the merits of minimizing the views of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic

---

[22] 109 Cong. Rec. 9209 (1963).

[23] 474 F. 2d at 232.

[24] *See* Zuber v. Allen, 396 U. S. 168, 186 (1969); United States v. O'Brien, 391 U. S. 367, 385 (1967), involving situations of *conflict* between Committee reports and statements of legislators. *Cf.* American Airlines, Inc. v. C. A. B., 365 F. 2d 939, 949 (D. C. Cir. 1966).

conflict between the Report and Congressman Goodell's statements. A comparison of the two demonstrates this:

Committee Report:	Congressman Goodell:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . ."	"Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor." (emphasis supplied)
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . ." (emphasis supplied)
"Thus, among other things . . . differences based on experience, training or ability would also be excluded."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill . . . ." (emphasis supplied)

Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explanation would not appear inappropriate. Indeed, a sponsor's views are entitled to

great weight in any event.[25] As this Court stated in Gartner v. Soloner:[26]

> "In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102."

We conclude, then, that time of day worked is a "working condition" within the meaning of the Equal Pay Act and not merely a "factor other than sex" to be used by an employer as a matter of defense.[27]

Therefore, in the circumstances of this case, the statute is inapplicable. Because of this conclusion, we need not and do not decide Corning's other contentions, urged to support affirmance of the district court's judgment.[28]

---

[25] *See, e.g.,* National Woodwork Mfgs. Assn. v. N. L. R. B., 386 U. S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U. S. 384, 394 (1951); Pan American World Airways, Inc. v. C. A. B., 380 F. 2d 770, 782 (2d Cir. 1967), *aff'd,* 391 U. S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F. 2d 589, 595 (3d Cir. 1973).

[26] 384 F. 2d 348, 353 (3d Cir. 1967), *cert. denied,* 390 U. S. 1040 (1968).

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a "factor other than sex" and not a "working condition," 29 C. F. R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it.

[28] For example, we need not address attention to Corning's assertion that the actual work performed by night inspectors and day inspectors is essentially equal in terms of skill, effort, and responsibility, *see* Shultz v. Wheaton Glass Co., 421 F. 2d 259 (3d Cir.), *cert. denied,* 398 U. S. 905 (1970), since, as we hold, the night inspectors and the day inspectors were not working "under similar working conditions."

IV.

Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. Congress was careful not to make the equal pay provisions a "Bali Hai," inviting either the Secretary of Labor or the courts to substitute their judgment for that of employers or to judge the merits of job systems. Rather, our task is merely to determine whether an employer has discriminated on the basis of sex by paying different wages "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ."

In terms of congressional intent, we cannot say that the district court erred in concluding that "a given job performed [by some at night and others during the day] is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.'"

The judgment of the district court will be affirmed.

To the Clerk:

Please file the foregoing opinion.

.....

Circuit Judge

[Filed, June 28, 1973]

JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETER BRENNAN, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

CORNING GLASS WORKS, a corporation.

No. 72-1590.

(D. C. Civil Action No. 69-396.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: KALODNER, ALDISERT and ADAMS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 31, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

s/ THOMAS P. QUINN,
Clerk.

June 28, 1973.

ORDER ALLOWING CERTIORARI.

(Filed December 17, 1973.)

SUPREME COURT OF THE UNITED STATES

No. 73-695

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

CORNING GLASS WORKS.

ORDER ALLOWING CERTIORARI. Filed December 17, 1973. The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 73-29 and a total of one hour is allotted for oral argument.

FILED
JUN 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72- 78-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Petitioner.

Of Counsel:

WALTER P. DEFOREST,
DANIEL I. BOOKER,

REED SMITH SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHARRON, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	8
1. Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act	8
2. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance	15
3. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the disputed jobs and protecting all persons, then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded	20
Conclusion	22
Appendix A	24
Appendix B	45
Appendix C	68
Appendix D	79

PAGE

CITATIONS.

Cases:

Hodgson v. Corning Glass Works, 341 F.Supp. 18 (M.D. Pa. 1972) 8, 14
Hodgson v. Miller Brewing Co., 457 F. 2d 221 (7th Cir. 1972) 18
Hodgson v. Square D Co., 459 F.2d 805 (6th Cir.), *cert. denied*, 409 U.S. 967 (1972), *aff'g* 19 Wage and Hour Cases 752 (E.D. Ky. 1970) 18
Kober v. Westinghouse Elec. Corp., ____ F.2d ____, 109 Daily Labor Reports (June 6, 1973) E-1 (3rd Cir. May 25, 1973) 20
LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 990 (1972) 20
Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, ____ U.S. ____, 41 U.S.L.W. 3445 (1973) 20
Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) 20
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 13
Shultz v. American Can Co.-Dixie Products, 424 F.2d 356 (8th Cir. 1970) 18
United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). 19
United States v. Oregon, 366 U.S. 643 (1961) 17

Statutes:

Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d)(1) 3, 16
Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. § 201, *et seq.* 3
Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e, *et seq.* 19
Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws.. 5
Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws.. 4
Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws 4
N.Y. Labor Law § 173 (McKinney 1965) 5

III.

PAGE

Miscellaneous:

2 CCH Lab. L. Rep., State Laws ¶ 44,501 (1970) (regulations) 5
109 Cong. Record, House, May 23, 1963, p. 9191 17
p. 9198..... 18
p. 9209.....9, 10
p. 9210.....11, 12
H. R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963)..... 17
S. Rep. No. 176, 88th Cong., 1st Sess. (1963), 109 Cong. Record, Senate, May 17, 1963, p. 8915 17
Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Education and Labor, 88th Cong., 1st Sess. 65 (1963) 17

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Corning Glass Works, Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, *infra*) is reported at 474 F.2d 226. The opinions of the district court are reported at 319 F. Supp. 1161 (App. B, *infra*) and 330 F. Supp. 46 (App. C, *infra*).

Jurisdiction

The judgment of the court of appeals was entered on February 2, 1973. On April 18, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

2. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

3. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the disputed jobs and protecting all persons, then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

Statute Involved

The statute involved is as follows:

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d)(1):

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Statement

This suit was brought by the Secretary of Labor seeking to enjoin an alleged violation by Corning Glass Works ("Corning") of the equal pay provisions of the Fair Labor Standards Act,[1] and to recover wages allegedly due employees in accordance with the provisions of Section 17 of the Act.

The sole basis for the action is that Corning, at two establishments located in Corning, New York, paid cer-

[1] Act of June 25, 1938, 52 Stat. 1060, as amended, 29 U.S.C. § 201, *et seq.*

tain inspector job classifications more money for work on a steady night shift than for work on jobs having the same titles on day shifts.

The fact findings of the district court show that during the late 1920's Corning began to produce glass products with sufficient speed that it became necessary for the first time to employ inspectors on a night shift (App. B, *infra*, p. 50). In 1930 women filled most of the inspection jobs on the day shifts (App. B, *infra*, p. 50).

At that time New York law prohibited the employment of women between the hours of 10:00 p. m. and 6:00 a. m.[2]

In those days Corning did not bargain with a labor union; thus, there was no contract providing payment of a formal shift differential to compensate employees working a steady night shift (App. B, *infra*, p. 50). Corning had to pay a higher wage rate to persuade people to perform the inspection jobs on the steady night shift (App. B, *infra*, p. 50).

These pay practices continued until World War II during which time the district court found not only that Corning was permitted to employ women on the steady night shift jobs but also that the women were paid the higher steady night shift wage rate—the same rate paid to men working as inspectors on that shift (App. B, *infra*. pp. 50-51).

In 1944 a union organized Corning's employees and negotiated a labor agreement which included a shift differential for steady night shift work and which added per-

---

[2] Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws (which carried forward, without change, the prohibition against night work by females) (App. B, *infra*, p. 50).

centage increases to the pre-existing base rates of all inspection jobs (App. B, *infra*, p. 51).

After World War II New York law again prohibited the employment of women at night (App. B, *infra*, p. 51).

New York law was amended in 1953 to permit women over 21 years of age to work after midnight where the State Industrial Commissioner granted his approval.[3] Until January 1, 1970, the New York Commission's policy provided that the Commissioner's approval would only be granted where, *inter alia*, the collective bargaining agreement did not prohibit such employment.[4]

Corning had unsuccessfully sought the union's agreement to open the steady night shift to women as early as the 1950's. However, the union's agreement was not obtained until June 1, 1966 (App. B, infra, p. 54).

After June 1, 1966, women in substantial numbers were employed on the steady night shift as the turnover in these jobs was substantial and over half the vacancies were taken by women (App. A, *infra*, p. 29; App. B, *infra*, p. 54). Thus, as the district court found, all wage increases which accrued to the jobs here involved, subsequent to June 1, 1966, regardless of shift, were received by men and women alike (App. B, *infra*, pp. 60-61).

Finally, as the circuit court found Corning and the union negotiated a new contract effective January 20, 1969, which included a job evaluation plan which abolished the rate difference between steady night inspection work and

---

[3] Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws.

[4] N.Y. Labor Law § 173 (McKinney 1965); *cf.* 2 CCH Lab. L. Rep., State Laws ¶44,501 at 56,781 (1970) for a recent codification of similar regulations.

day inspection work and increased the day rates so that rates were the same on all shifts and higher than the previously existing steady night shift wage rates (App. A, *infra*, p. 29). The district court had found that the above "job evaluated" rate was "fair, non-discriminatory . . . [and] not based on sex" (App. C, *infra*, p. 70). The agreement also provided that every person, regardless of sex, employed by Corning prior to its effective date, January 20, 1969, would receive an even higher "red circle" rate when employed on a steady night shift inspection job (App. A, *infra*, pp. 29-30; App. C, *infra*, p. 70).

The district court found that work on a steady night shift was not under a similar condition as day work but, nevertheless, concluded that Corning had violated the Equal Pay Act by maintaining a higher base wage rate for the inspection jobs on the steady night shift on the ground that the contract shift differential "adequately" compensated employees for working undesirable hours (App. B, *infra*, p. 62).

The district court failed to discuss the question of whether Corning had complied with the Act by opening the steady night shift jobs to women on June 1, 1966; however, the court ruled that the agreement of January 20, 1969, had cured the violation and denied the Secretary's request for an injunction beyond that date (App. B, *infra*, p. 67).

Subsequently, the district court granted the Secretary's motion, under F. R. Civ. P. Rule 52, to amend the court's fact findings and to obtain additional findings and further injunctive relief. The district court issued a second opinion (App. C, *infra*) in which the court, in part, reversed its prior finding, concluded that the 1969 agreement also violated the Equal Pay Act, by reason of the inclusion of the "red circle"

rate provision, and ordered Corning to raise the wage rates of the day shift inspection jobs to the level of the "red circle" rates. Finally, the district court issued a "nationwide injunction" covering all Corning facilities, except the Wellsboro, Pennsylvania, plant, which was involved in a similar litigation. This injunction directed Corning in general terms to obey the Equal Pay Act (App. C, *infra*, pp. 74-76).

The court of appeals sustained the district court's rulings holding that the payment of the higher steady night shift rate violated the Equal Pay Act and that the 1969 "red circle" rate agreement failed to cure the violation. The court of appeals also considered and rejected Corning's contention that the opening of the jobs to women in June, 1966, cured the violation. The circuit court struck down the "nationwide injunction" since it was not supported by the evidence (App. A, *infra*, pp. 42-44).

The Second Circuit rejected the district court's view that the Act could be applied even where working conditions on the comparison jobs were different (App. A, *infra*, p. 32). However, the Second Circuit held the Act to be applicable because, although the resolution of the issues was "not free from doubt" (App. A, *infra*, p. 30) and the result, perhaps, seemed "harsh" (App. A, *infra*, p. 42), that court concluded that the legislative history of the Equal Pay Act indicated that Congress did not intend that the difference between night work and day work be recognized as a different "working condition" under the Act (App. A, *infra*, p. 32).

Similarly, the court of appeals concluded that Corning's opening of the night jobs to women in 1966 failed to cure the violation because the court adopted the view that the legislative history indicated that the proviso in the Act

which prohibits a reduction of wage rates in order to comply with the Act, really means that wage rates must be increased (App. A, *infra*, p. 40).

Finally, the court of appeals ruled that the introduction of a comprehensive job evaluation plan in 1969, accompanied by an increase of the disputed rates beyond the prior steady night shift rate, failed to cure the violation because Corning agreed to continue to pay all persons employed on the date of the agreement an even higher rate for steady night shift work. The court held this "red circle" rate to "perpetuate" the violation (App. A, *infra*, p. 41).

Reasons for Granting the Writ

1. Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The decision below is in direct conflict, on the threshold issue in dispute, with the decision of the district court in *Hodgson v. Corning Glass Works*, 341 F. Supp. 18 (M.D. Pa. 1972), a case between the same parties, which is presently pending before the United States Court of Appeals for the Third Circuit. The Third Circuit has heard argument but has not yet issued a decision. The district court in that case held that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar . . . ." 341 F. Supp. at 21.

a. The issue of whether night is a different working condition than day within the meaning of the Equal Pay Act affects each of the thousands of businesses around the country which employ persons to work at night at higher rates of compensation than day workers. Review by this Court is thus essential to the correct and orderly administration of the Act in accordance with the intention of Congress.

b. The court below erred in holding that the legislative history required it to conclude that work at night is not a different working condition than day work within the meaning of the Equal Pay Act.

Common experience as well as all of the competent authorities in physiology and sociology make it plain that night work is not under a similar condition as day work. Judge Friendly clearly recognized this truth—during oral argument he stated from the bench: "You'd have to pay me twice as much to work at night." Moreover, in its opinion the Second Circuit conceded that the resolution of the issue was "not free from doubt" (App. A, *infra*, p. 30) and that the result, perhaps, seemed "harsh" (App. A, *infra*, p. 42).

It is plain that the Second Circuit was persuaded to this doubtful and perhaps harsh result—contrary to every man's experience and to the ordinary use of the words—because the court accepted the Secretary's reading of the legislative history.

The Secretary persuaded the Second Circuit to accept an incorrect interpretation of certain statements in a Report by the House Special Subcommittee on Labor which we will review below along with the other relevant legislative history necessary to properly understand that Report. 109 Cong. Record, House, May 23, 1963, p. 9209 (App. D, *infra*).

Representative Charles Goodell, as the court below found, was the sponsor of the Equal Pay Act (App. A, *infra*, p. 34) and was a member of the Special Subcommittee on Labor which redrafted and reported the Bill to the House.

Mr. Goodell read the Subcommittee Report in question into the Congressional Record.

Immediately prior to reading the Report into the Congressional Record, Representative Goodell stated "Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill." Goodell proceeded to read into the Congressional Record fifteen such "examples and guidelines." These statements were obviously deliberately prepared with great care and, from the context of Goodell's statement, it appears certain that he was speaking for the Subcommittee. Among the "examples and general guidelines" was the following:

> "Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" [Emphasis supplied] 109 Cong. Record, House, May 23, 1963, p. 9209 (App. D, *infra*, p. 82).

This statement, made by the sponsor of the Bill immediately prior to reading the Subcommittee Report into the

Congressional Record and proclaimed as an example and general guideline as to the intent of Congress, is the *only statement* on the point in dispute which is *clear* and *unambiguous.*

Goodell stated plainly that a difference in hours of work or shift was intended by Congress to constitute a difference in working conditions within the meaning of the Equal Pay Act.

The court below felt that Goodell's clear statement of Congressional intent was outweighed by the following statement in the Subcommittee Report (which Goodell also read into the Record):

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. . . ." 109 Cong. Record, House, May 23, 1963, p. 9210 (App. D, *infra*, p. 87).

The opinion of the court below interlineated the words "differentials based on any other factors other than sex," in brackets, after the words "the broad general exclusion" in the next to last sentence in the quoted paragraph, indicating the court's belief that the "broad general exclusion" referred to was a "factor other than sex" upon which the Act permits wage rates to be based (App. A, *infra*, p. 34). Although it is not entirely clear, this is probably a correct interpretation.

The court concluded, without apparently considering other possibilities, that the examples listed in the last quoted sentence, which begins with the word "Thus" were intended as examples of a "factor other than sex."

The court's interpretation is demonstrably incorrect and would make the Subcommittee Report internally inconsistent. The sentence beginning with the word "Thus" could not have been limited to examples of "factors other than sex" because that sentence included the example of "lifting or moving heavy objects." Lifting or moving of heavy objects is, beyond dispute, an example of "effort." "Effort" is, of course, along with "working conditions" one of the specifically listed requisites of the Equal Pay Act. It seems clear that the sentence beginning with the word "Thus" sums up, by example, those matters to which the Act was not intended to apply.[5]

Representative Goodell's prepared statement setting forth examples and guidelines as to the intent of Congress, quoted above at p. 10, *supra*, is a direct clarification of any ambiguity in that paragraph of the Subcommittee Report which is misinterpreted by the Secretary and by the Second Circuit.

Subcommittee Report:	Goodell stated:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded. . . ."	"Ninth . . . Finally . . . hours of work, difference in shift, all would logically fall within the *working condition* factor." [Emphasis supplied]

[5] It is important to note that the two paragraphs in the Subcommittee Report which preceded the paragraph relied upon by the Second Circuit discussed skill, effort, responsibility and working conditions. 109 Cong. Record, House, May 23, 1963, p. 9210 (App. D, *infra*, p. 86).

Subcommittee Report:	Goodell stated:
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded. . . ."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort*. . . . ." [Emphasis supplied]
"Thus, among other things . . . differences based on experience, training, or ability would also be excluded. . . ."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of *skill*. . . . ." [Emphasis supplied]

Goodell's prepared statement as to the intent of Congress is not contrary to the Subcommittee Report—it is complimentary to it and specifically explains and clarifies its meaning.

In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), this Court, in construing the legislative history of the Miller-Tydings Act indicated that remarks by sponsors of a statute, such as Representative Goodell's, should be given great weight in the resolution of any uncertainty in the words of that statute.

The Second Circuit also seemed to place some reliance upon the fact that Corning's then manager of industrial relations research had testified before the House Subcommittee about Corning's Job Evaluation Plan and had said nothing about time of day worked as a working condition (App. A, *infra*, pp. 32-33).

The fact is that work on a steady night shift is a working condition of such importance that unions and companies are seldom, if ever, willing to include it in negotiated job evaluation plans because to do so would fix its value in relation to other job factors. Unions and companies want to be free to negotiate the value of this

condition, which, as the district court in the Third Circuit case found is "a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard." *Hodgson* v. *Corning Glass Works, supra*, 341 F.Supp. at 21.

We respectfully submit that the court below erroneously decided this issue.

The Second Circuit accepted the Secretary's analysis of legislative intent which was incomplete and erroneous.

The paragraph of the Subcommittee Report upon which the Second Circuit relied is internally inconsistent when interpreted as the Second Circuit suggests is proper. It is harmonious when read as we suggest and is also entirely consistent with the explanation and clarification read into the record by the sponsor of the Bill.

It is clear that the Equal Pay Act was not intended to be applied to compare jobs which are not substantially equal. Congress did not want the Secretary to attempt to evaluate jobs on which there were real and substantial differences.

2. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

This Question, as well as Question 3, deals with certain recurring and important issues in the enforcement of and compliance with the Act in situations where prior violations or potential violations have occurred. The reasons for granting a writ of certiorari which are discussed under this Question are also generally applicable to the granting of a writ of certiorari as to Question 3.

a. The manner by which compliance with the Act can be achieved has never been considered by this Court.

b. These matters are plainly of broad general application and importance since they confront all employers, employees, and unions faced with remedying violations of the Act.

c. The court below incorrectly decided this Question.

On June 1, 1966, Corning opened the higher paying night shift inspection jobs to women (App. B, *infra*, p. 54). After that date both men and women received both the day inspection rate and the night shift inspection rate (App. B, *infra*, p. 54). After that date there were no distinctions in the wage rate paid to either sex (App. B, *infra*, pp. 60-61).

The Second Circuit held (App. A, *infra*, p. 40) that Corning had not achieved compliance with the Act because Corning was in violation of what is called the "reduction proviso" of the Act which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

There was neither proof in the record nor any finding by any of the courts below that an employee's wage rate had been reduced. Of course, no employee's wages had been reduced, because the action Corning took to achieve compliance with the Act was to open up the night shift inspection jobs to women.

However, the Second Circuit has decided that the phrase "shall not reduce" should be interpreted to mean "shall increase the wage rate of the lower rated job" (App. A, *infra*, p. 40). The Second Circuit has rewritten the Act to require that in every case of violation the wage rate of the lower rated job must be increased to the level of the higher rated job.

For the following reasons, we believe that the Second Circuit erred in so rewriting the Act.

The interpretation of the Second Circuit is in conflict with the specific language of the Act. The requirement that rates may not be *reduced* does not justify the conclusion that compliance cannot be achieved unless the lower rated job is *increased*.

Although it indicated some persuasion to Corning's position, the Second Circuit felt compelled by certain legislative history from the House of Representatives to hold that the lower rated job must always be increased

to the higher rate (App. A, *infra*, p. 40).[6] Corning believes that this was a mistake. First, legislative history should not be used to change the clear meaning of the words of the Act.[7] Further, although it is true that the legislative history in the House contains statements that the lower rate should be increased, those statements do not establish that the House intended to rule out the possibility that compliance could be achieved through the opening of the higher rated job to women. Actually those statements in the House legislative history seem to have been intended merely as a rejection of the possibility that compliance might be achieved through a reduction in the rate of the higher rated job.[8] The legislators in the House, as well as in the Senate, seem to have been essentially concerned with prohibiting the reduction of the wage rate for the higher rated jobs. Senate Report No. 176, for example, makes clear that the Senate felt that the "reduction provision" was aimed at establishing that an "individual's present economic status" would not be adversely affected by the enactment of the legislation.[9] This prohibition against a reduction of the higher rate is precisely what Congress did in the explicit language of the Act.

---

[6] The Second Circuit referred (App. A, *infra*, p. 40) to statements of Representative Griffin in *Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) and H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963).

[7] *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

[8] *E.g.*, Representative Thompson stated: "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*" [Emphasis supplied] 109 Cong. Record, House, May 23, 1963, p. 9196. Representative Thompson's statements indicate that he was considering only the alternatives of increasing the lower rate or reducing the higher. Opening the higher rated job to women obviously does not have "an adverse effect on already established wage patterns."

[9] S. Rep. No. 176, 88th Cong., 1st Sess. (1963), 109 Cong. Record, Senate, May 17, 1963, p. 8915.

The court below also relied upon decisions in two other circuits in rationalizing its conclusion.[10] Those decisions should not be read as establishing the rule that the lower rated job must always be increased to the higher rate. In *Hodgson* v. *Square D Co.*[11] and *Shultz* v. *American Can Co.–Dixie Products*[12] the Sixth and Eighth Circuits, respectively, dealt with situations in which the higher rated jobs were opened to women but the women had not actually been able to work on those jobs.

There are good reasons in policy why the Act reads as it does and why the courts should not rewrite it to require that the lower rated job must always be increased to the higher rate.

Congress intended to afford maximum flexibility to the collective bargaining system in adjusting rate relationships.[13] The rule proposed by the court below eliminates these matters from collective bargaining and mandates an

---

[10] App. A, *infra*, pp. 40-41. In a third case, to which the Second Circuit made only a comparison citation, *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226 (7th Cir. 1972), the Seventh Circuit noted that Miller Brewing, through a complex system of transferring employees, "arrived at the same result as if it had initially, after the effective date of the Equal Pay Act, equalized pay in the Analytical Lab by lowering the male employees wages by 70 cents per hour."

[11] 459 F.2d 805, 808 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972). The Eastern District of Kentucky discussed the fact that women had been discouraged from taking the higher rated job. 19 Wage and Hour Cases 752, 754 (E.D. Ky. 1970).

[12] 424 F.2d 356, 359 (8th Cir. 1970).

[13] An example of this intention to allow a maximum of freedom in setting rate relationships is found in statements made, in the course of debate on the bill, by Congressman Goodell that Congress wanted "the private enterprise system, employer and employees and a union, if there is a union, and the employer and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it" as long as the pay differentials were not based on sex. 109 Cong. Record, House, May 23, 1963, p. 9198.

increase in the lower rate even if the employer and the union believe that the jobs should not bear the same wage rate. The Second Circuit's rule will usually be disruptive of the many rate interrelationships between the jobs which are being litigated and the other jobs in the employer's establishment. This disruption can have far reaching effects upon employee job bidding tendencies and create employee dissatisfaction with rate inequities caused by this disruption.

The rule adopted by the court below conflicts in principle with the approach taken by the courts attempting to remedy sex and race discrimination under Title VII of the Civil Rights Act of 1964.[14] There is no good reason why a federal court should be mandated to apply a different and more harsh remedy to a case which is brought under the Equal Pay Act than the remedies available to that court if the same factual situation were attacked under the sex discrimination prohibitions of Title VII.

Similarly, the Second Circuit's rule makes no adjustment for situations, such as the instant one, where an employer has excluded women from a job because of state protective legislation.[15] Recent decisions under Title VII

---

[14] Act of July 2, 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e, *et seq.* In *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 422 n. 5 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), for example, one of the main contentions was that the Terminal considered only whites for jobs affording better pay. The Fifth Circuit did not order that the wage rates of "black" jobs be raised to the wage level of "white" jobs. The Fifth Circuit ordered the employer to do exactly what Corning did on June 1, 1966, *i.e.*, permit members of the allegedly affected class to take the better paying jobs, as vacancies occur.

[15] See pp. 4-5, *supra*. Although the Second Circuit opinion does not recognize this fact, Corning was prohibited by the New York protective laws from opening the night shift to women before the union agreed. Corning was not able to obtain union approval until June 1, 1966.

of the Civil Rights Act of 1964 have recognized the inappropriateness of imposing liability under the federal statute where sexual exclusion from jobs has been based upon state protective legislation.[16]

For all of these reasons, Corning believes that this Court should grant a writ of certiorari to determine whether the phrase in the Act which prohibits reductions should be rewritten, as the Second Circuit has done, to mandate increases in every instance.

3. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the disputed jobs and protecting all persons, then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

a. This Question, in conjunction with Question 2, is extremely important to the correct and orderly administration of the Act because every employer who is faced with a potential equal pay violation must seek a form of compliance with the Act which will not be disruptive of fair, nondiscriminatory rate relationships among the jobs potentially affected by an equal pay problem and all of the other jobs in the enterprise and to which he can attain union acceptance.

b. The court below incorrectly decided this Question.

---

[16] *E.g., Kober* v. *Westinghouse Elec. Corp.*, _____ F.2d _____, 109 Daily Labor Reports (June 6, 1973) E-1 (3rd Cir. May 25, 1973); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, _____ U.S. _____, 41 U.S.L.W. 3445 (1973); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 990 (1972); *Rosenfeld* v. *Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

By 1969 Corning believed that it had certainly achieved compliance with the Act by permitting women to work on the comparison jobs from which they had been excluded and evaluating the rate which should be paid for the work on the comparison jobs on the basis of a fair and non-discriminatory system which developed a fair wage rate for that work in comparison with all of the jobs in the employer's business.

In January, 1969, Corning negotiated a job evaluation plan with the union which the district court found had rated the disputed jobs, and all other jobs, in a fair and non-discriminatory manner, not based on sex (App. C, *infra*, p. 70). Although this admittedly fair rate was higher than the rate of the higher rated night job prior to the agreement, in order to reach agreement with the union Corning agreed to "red circle" *all persons* employed on the date of the agreement to a rate which was even higher than the fair job evaluated rate when those persons worked on the night job.

The court below conceded that had Corning done no more than install the job evaluation plan, which fairly rated the disputed jobs, there could have been no serious claim of a continued violation (App. A, *infra*, p. 29). However, the Second Circuit held that the "red circle" rate perpetuated discrimination (App. A, *infra*, p. 41).

Since the jobs are fully integrated, the "red circle" rate provided by the January, 1969, agreement has been received by both men and women. Eventually that "red circle" rate would be phased out as those persons who were employed in January, 1969, retire, quit or bid on other jobs. We do not see how it perpetuates any discrimination.

The court below has required that Corning raise the admittedly fair and non-discriminatory job evaluated rate

to the level of the "red circle" rate. Thus, the court has required Corning to create an inequity in rate relationships which can only be resolved by raising the entire wage curve, affecting all jobs, which would involve a prohibitive cost.

Every employer who is faced with the dual problems of a violation or potential violation of the Equal Pay Act and of bargaining with a union will inevitably seek a sensible means of compliance which will involve "red circle" rates and which will run afoul of the decision of the court below in this case.

The rule established by the court below is not required by the Act and is contrary to the expressed intent of Congress to grant wide latitude to the free process of collective bargaining to establish wage rates.[17]

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Petitioner.

Of Counsel:
WALTER P. DEFOREST,
DANIEL I. BOOKER,
REED SMITH SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

[17] See note 13, *supra*.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix A—Opinion of the Court of Appeals, 474 F. 2d 226.

Appendix B—Opinion of the District Court, 319 F. Supp. 1161.

Appendix C—Opinion of the District Court, 330 F. Supp. 46.

Appendix D—109 Cong. Record, House, May 23, 1963, pp. 9209-11.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 252, 349—September Term, 1972.

(Argued January 4, 1973 Decided February 2, 1973.)

Docket Nos. 72-1229
72-1230

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Appellee,

v.

CORNING GLASS WORKS, a Corporation,

Appellant.

Before:

FRIENDLY, *Chief Judge,*

KAUFMAN, *Circuit Judge,* and HOLDEN,* *District Judge.*

Appeal from a judgment of the District Court for the Western District of New York, John T. Curtin, *Judge,* 319 F. Supp. 1161, 330 F. Supp. 46, in an action by the

* Chief Judge of the District Court for the District of Vermont, sitting by designation.

Secretary of Labor under the equal pay provisions of the Fair Labor Standards Act, awarding back pay and enjoining future violations.

Modified and affirmed.

Carin Ann Clauss, Esq., Associate Solicitor (Richard F. Schubert, Esq., Solicitor of Labor, Francis V. LaRuffa, Esq., Regional Solicitor, Donald S. Shire, Esq., Helen W. Judd, Esq., Isabelle R. Cappello, Esq., and Sylvia S. Ellison, Esq., Attorneys, of Counsel), *for Appellee.*

Scott F. Zimmerman, Esq., Pittsburgh, Pennsylvania (Reed, Smith, Shaw & McClay, John G. Wayman, Esq., and Walter P. DeForest, Esq., Pittsburgh, Pennsylvania, of Counsel), *for Appellant.*

FRIENDLY, *Chief Judge:*

This appeal marks this Court's first encounter with the Equal Pay Act of 1963, 29 U.S.C. § 206(d), one of the many beneficent remedial statutes enacted during the last decade which create new tasks for the federal courts. The burden is increased, perhaps needlessly, because, as is the case with other provisions of the Fair Labor Standards Act of which it forms a part, the Equal Pay Act has no provision for administrative fact-finding.

The controlling statute, 29 U.S.C. § 206(d)(1), of seeming simplicity, reads as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

> tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

I.

Since the parties broadly accept the factual findings of the district court, a brief summary will suffice.

The controversy concerns the wages paid by Corning Glass Works ("Corning") to Class B, Class C, and General TV inspectors,[1] in its A Factory, B & C Factory, and Pressware Plant at Corning, New York. Prior to 1925, Corning operated its plants only during the day, and found it unnecessary or undesirable to have a night shift. Between 1925 and 1930, however, the introduction of automatic production equipment made it necessary to institute a night inspection shift. Although, as the dis-

[1] Although the Secretary of Labor previously claimed that the wages paid to a fourth class of employees, TV Inspectors, also violated the Equal Pay Act, the district court seemingly held that the Secretary had not met his burden of proof that the work done by men and women on these jobs was equal and did not include these jobs in its back pay award. See *Shultz* v. *Corning Glass Works,* 319 F. Supp. 1161, 1168, 1171 (W.D.N.Y. 1970). The Secretary has not appealed this aspect of the district court's order.

trict judge found, *Shultz* v. *Corning Glass Works*, 319 F.Supp. 1161, 1170 (W.D. N.Y. 1970), previously "women had filled most, if not all, of the inspection jobs on the day and afternoon shifts," New York law[2] then prohibited the employment of women between 10:00 P.M. and 6:00 A.M., and thus Corning had to recruit male employees for a steady night shift. They demanded and received wages comparable to what they were earning on other, often more demanding jobs in the plant, which were approximately twice those paid to the female inspectors. The base rate for the inspectors on the night shift was 53 cents per hour, as against 24 to 28 cents per hour for the female inspectors on the day shifts.

Thus a situation was created where the night inspection shift was all male, the day shift virtually all female, and the males received wages significantly higher than the females. This state of affairs persisted until the effective date of the Equal Pay Act—and beyond it—except for one brief period when, because of labor shortages during World War II, New York allowed women to work at night; women employed by Corning on the night shift during that period received the same wages as the men when they performed the same work. In 1944 the Corning, New York plants were organized by the American Flint Glass Workers Union and a collective bargaining agreement was negotiated which provided for the company's first plant-wide night shift differential.[3] But this change

[2] 1927 N.Y. Laws, ch. 453; 1930 N.Y. Laws, ch. 868.

[3] The record does not reveal whether, apart from the inspectors, Corning had paid more for night work before the institution of the plant-wide differential in the 1944 agreement. Corning suggested

(Footnote continued on following page)

in Corning's wage structure did not eliminate the higher base wage paid to male night inspectors since, in the case of the inspectors, the shift differential was superimposed upon the existing difference in wage scales. Similarly, although in 1953 New York changed its law to permit females over the age of 21 to work after midnight in factories operating multiple shifts where the Industrial Commissioner found transportation and safety conditions to be satisfactory and granted approval,[4] the record does not reveal any application by Corning for such approval prior to 1966.

The Equal Pay Act became effective with respect to Corning's Corning, New York plants on June 11, 1964.[5] Since Corning had previously maintained separate "male" and "female" rate schedules plant-wide, with the latter materially lower, the Act clearly called for action on its part. Corning therefore merged the separate schedules into one. However, so far as concerned the inspectors, this was a matter of theory only, since the day shift inspectors were assigned to lower wage groups, see 319 F. Supp. at 1165-66. Thus, as the district court found, 319

(Footnote continued from preceding page)
that there might have been other jobs performed by women during the day for which the company had to pay a higher wage to get men to perform at night. It seems relatively clear, however, that if a job had been performed on the day shift by men, men on the night shift would receive the same wage.

[4] 1953 N.Y. Laws, ch. 708, *amending* N.Y. Labor Law § 172, *now* N.Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

[5] It was stipulated that the statute of limitations barred all claims arising prior to November 1, 1964 and that any back pay awards in this action should run only from that date.

F. Supp. at 1166, "the merger continued the historical difference in base hourly rates of the men and women inspectors working the three shifts."

Corning's first significant step toward eliminating the differential wage rates for male and female inspectors took place on June 1, 1966, when it opened the inspection jobs on the night shift to women, presumably with the approval of the State Industrial Commissioner. At this time Corning consolidated its theretofore separate male and female seniority lists, and women became eligible to bid for the higher paid night inspection jobs when vacancies occurred. It is undisputed that a considerable number of women took advantage of this opportunity; turnover in the night inspection jobs was substantial and over half the vacancies were taken by women. Still, the process required some time since women could not exercise their seniority to "bump" a less senior male night inspector.[6]

The last significant event was Corning's negotiation of a new collective bargaining agreement with the Flint Glass Workers Union, effective January 20, 1969. This abolished the separate base wage rates of day and night shift inspectors and increased the rate for all inspectors, so that the resulting base wage was the same for all three shifts and exceeded the wage rates on the steady night shift previously in effect. If the agreement had stopped at that point, there could be no substantial claim of further violation of the Equal Pay Act. However, the agreement provided for a higher "red circle" basic rate to every person

[6] In 1966 only 4 of 15 women requesting transfer to the night shift received this. The situation later improved so that 39 out of 61 requests were honored in 1967, and 42 out of 52 through November 7 in 1968.

employed before January 20, 1969, when working as an inspector on the night shift. At the time of the last hearing in the district court, over two years after the new agreement went into effect, all the night inspectors were being paid at the "red circle" rate; unless Corning changes its system, this is likely to continue for some time since at the date of the hearing over 500 laid-off inspectors had to be offered reemployment before any new inspectors could be hired.

The district court held that Corning had been in continuing violation of the Equal Pay Act; directed it to pay the night rate to all inspectors from November 1, 1964, see note 5 *supra*, to January 20, 1969, and the "red circle" rate thereafter to all inspectors until true equalization was effected; awarded interest at the rate of 6% per annum on the amounts withheld; and issued an injunction against future violations of the Act of any kind with respect to all categories of employees at all plants except the branch plant at Wellsboro, Pennsylvania.[7] Corning claims that it was never in violation of the Equal Pay Act; that if it was, any violation ended on June 1, 1966, when women became eligible to work on the night shift, or, at latest, on January 20, 1969, when the differences in basic wage rates were abolished; and that the broad injunction was unjustified. Although the issues are not free from doubt, we reject all contentions save the last.

[7] The reason for the exception was that an action with respect to the Wellsboro plant, on facts similar to those in the instant case, was then pending in the District Court for the Middle District of Pennsylvania. This has since been decided in favor of Corning, *Hodgson* v. *Corning Glass Works*, 341 F. Supp. 18 (1972), and is now on appeal to the Third Circuit.

II.

The parties are in agreement on the general approach we should follow. The initial question is whether the inspection jobs on the day and night shifts constituted "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The Secretary has the burden on this, *Shultz* v. *American Can Co.*, 424 F.2d 356, 360 (8 Cir. 1970); *Hodgson* v. *Brookhaven Gen'l Hosp.*, 436 F.2d 719, 722 (5 Cir. 1970), and, if he has not sustained it, the complaint must be dismissed even if the wage differentials were unreasonably large in comparison with the actual differences in skill, effort, responsibility, or working conditions, and were based on discriminatory motivation; Congress did not intend to put either the Secretary or the courts in the business of evaluating jobs and determining what constituted a proper differential for unequal work. See 109 Cong. Rec. 9197-98, 9209 (1963); *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 227 (7 Cir. 1972). The Secretary also has the burden of establishing a prima facie case that the wage differentials represent "discriminat[ion] . . . on the basis of sex." *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3 Cir.), *cert. denied*, 398 U.S. 905 (1970). Once the Secretary has sustained these burdens, the employer can escape liability only by bringing itself within one of the four exceptions, the one that is particularly relevant here being the general escape clause, "a differential based on any other factor other than sex." On this the employer has the burden. *Shultz* v. *Wheaton Glass Co.*, *supra*, 421 F.2d at 266; *Shultz* v. *American Can Co.*, *supra*, 424 F.2d at 362.

Corning's most basic contention—one which, if sustained, would immediately end the case—is that work on a steady night shift is not performed under "working conditions" similar to work on day or afternoon shifts. To those uninitiated in the language of industrial relations, that would indeed seem to be true, and the District Court for the Middle District of Pennsylvania has so held, see note 7 *supra*. But, as said in one of Mr. Justice Frankfurter's early opinions, "[t]he recognized practices of an industry give life to the dead words of a statute dealing with it." *United States* v. *Maher*, 307 U.S. 148, 155 (1939). Statutory language addressed to experts must be read in the way the experts would understand it. See *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 326-27 (1951) (Frankfurter, J., dissenting).

The legislative history of the Equal Pay Act supports the construction that the time at which work is performed was not regarded as a "working condition" but rather as a proper subject for "a differential based on any other factor other than sex." The equal pay bills, H.R. 3861, 88th Cong., 1st Sess. (1963); S.910, 88th Cong., 1st Sess. (1963), as originally introduced in Congress, would have required equal pay for "equal work on jobs the performance of which requires equal skills." Ezra G. Hester, then Corning's Director of Industrial Relations Research, testified before both House and Senate Committees in opposition to this formulation. He pointed out that most of industry was by then using formal job evaluation systems in order to establish equitable wage structures in their plants, and that most of these job classification systems considered three factors in addition to "skill," to wit, ef-

fort, responsibility, and working conditions. As an example, he cited his own company's plan, which was introduced into the record. Under "working conditions" the plan and the accompanying job evaluation sheets listed two factors: "surroundings" (requiring evaluation of exposure to elements, intensity, and frequency) and "hazards" (requiring evaluation of frequency of exposure to hazard, frequency of injury, and seriousness of injury); nothing was said about time of day worked or differences in shift.[8] Mr. Hester testified that "Other companies use similar job evaluation sheets," and urged the committees to amend the proposed legislation to conform to these industry practices. See *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess. 232-40 (1963); *Hearings on S.882 and S.910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 96-104 (1963).

In response to this, the bill was rewritten in committee and placed in its present form. Five House Committee members thus explained the change, H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963):

---

[8] Edward W. Noble, Corning's Manager of Job Evaluation, testifying in this case, gave a similar description of Corning's job evaluation plan and said specifically that the time of day was not considered to be a "working condition." See also the Dictionary of Occupational Titles (3d ed. 1965), published by the Manpower Administration of the Department of Labor. Volume II: Occupational Classification, at 656, defines working conditions as "the physical surroundings of a worker in a specific job," and gives the following examples: inside work v. outside work, exposure to heat, cold, wetness, humidity, noise vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation. It does not mention night work.

> The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

Earlier in the report, at p. 3, the Committee had indicated where it thought shift differentials would fit into the statute:

> Three specific exceptions and one broad general exception are also listed. . . . As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.

This persuasive explanation of how the bill took shape, and the evident understanding of the Committee, consistent with this explanation, of the structure of the amended bill, outweigh the point, strongly pressed by Corning, that Representative Goodell, who introduced the bill and had a hand in redrafting it, remarked during the course of an explanation of its provisions that "hours of work, difference in shift . . . would logically fall within the working condition factor." 109 Cong. Rec. 9209 (1963). Corning also relies upon a statement by Representative Thompson, chairman of the Subcommittee:

> Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be exempted under this act.

109 Cong. Rec. 9196. But this does not assist Corning; indeed, since it is apparent that Representative Thompson was only paraphrasing his Committee's Report, this rather supports the construction that time of day differentials were covered under the catch-all exception rather than by the term "working conditions."

Administrative interpretation by the Wage and Hour Administrator, which the Supreme Court has held entitled to deference, *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), further indicates that shift differentials are to be considered a legitimate exception to the Act rather than to reflect a difference in working conditions which would make the statute inapplicable. 29 C.F.R. §§ 800.100 *et seq.* set out the Administrator's interpretations of each of the provisions of the Equal Pay Act and each of the terms used in the Act. Under "similar working conditions," § 800.132 says that "[g]enerally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions," which in itself would seem to indicate that shift differences are not considered different working conditions since this is such a common situation. The only examples given of different working conditions are the salesman who works in a store as compared with the salesman who sells door to door, or one who does repair work in a shop as compared with one who does repair work in customers' homes. In contrast, the Administrator recognizes the legitimacy of night shift differentials in § 800.145, under "Exceptions to Equal Pay Standard."

Finally, while the case law is not conclusive, the decisions, other than the recent one between the same parties

in the Middle District of Pennsylvania, see note 7 *supra*, are more favorable to the Secretary's position on this issue than to Corning's. See *Shultz* v. *American Can Co., supra*, 424 F.2d 356; *Hodgson* v. *Miller Brewing Co., supra*, 457 F.2d at 224-25 & n.8; *Wirtz* v. *Basic Inc.*, 256 F. Supp. 786 (D. Nev. 1966).

Corning's impressive evidence that night work not only is less attractive than day work but often causes physical and emotional problems thus does not carry the day. While the statute indeed permits all this to be taken into account, it is relevant under the catch-all exception, with its requirement that the employer establish that the differential was based on a factor other than sex, rather than making night work a different "working condition" and eliminating application of the statute altogether. Thus the question is whether the higher rate paid by Corning for night inspection work, until 1966 performed solely by males, was in fact intended as compensation for night work or constituted an added payment based in part upon sex.

A number of facts support the district court's conclusion that the latter was the situation here. As the history set out above indicates, the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks. The wage differential has never been regarded as compensation for night work. There was no evidence that any other night employees received higher pay than corresponding day workers until the plant-wide night differential was

superimposed on the basic rates in 1944;[9] since that time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work. Indeed, Corning had separate male and female salary schedules until June 11, 1964.

The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. A higher rate paid to men for performing low paid "female work" is not transformed into a permissible "differential based on any other factor other than sex" simply because the men work at night. We might, of course, have a different problem if New York had continued to prohibit the employment of women at night, but the prohibition had ended a decade before enactment of the Equal Pay Act, and there is nothing to indicate that Corning would have had any more difficulty in obtaining the Industrial Commissioner's approval in 1964 than it did in 1966.

The only other basis advanced by Corning to challenge the district court's finding that it initially violated the Act is its contention that the day and night shift inspection jobs were not "equal work . . . the performance of which requires equal skill, effort, and responsibility" because some of the men on the night shift had to do their own "utility work," involving a certain amount of packing and

[9] The first night shift differential was only five cents per hour; the excess in the base rates paid the men working as inspectors on the night shift over that paid the women on the day shift was at that time on the order of fourteen cents per hour.

lifting the inspected articles and cleaning up around the inspection station, which, on the day shifts, was primarily performed by male helpers especially hired for such work. It is now well settled, however, that the jobs under analysis need not be identical in every respect before the Equal Pay Act is applicable; inconsequential differences can be disregarded as long as the jobs are "substantially equal." *Shultz* v. *Wheaton Glass Co., supra,* 421 F.2d at 265; *Shultz* v. *American Can Co., supra,* 424 F.2d at 360; *Hodgson* v. *Fairmont Supply Co.,* 454 F.2d 490, 493 (4 Cir. 1972). Applying this standard, the district court rejected Corning's contention primarily on the ground that Corning's job evaluation plan "considered the utility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors."[10] 319 F. Supp. at 1169. As the court below noted, *id.*, these job descriptions, prepared through observation of actual job performance in 1963 and 1964, are particularly significant here since they demonstrate Corning's own view of the content of the jobs before its perspective was changed by

[10] Corning objects to the use made by the district court of the descriptions of the inspection jobs prepared for the Corning Glass Works Job Evaluation Plan (CGW Plan) and, to a lesser degree, of those contained in an earlier plan prepared for Corning by Stevenson, Jordan & Harrison (SJ&H Plan). Insofar as the objection rests on the hearsay rule, it is answered not only by the business records statute, 28 U.S.C. § 1732(a), but by the status of these plans as admissions (in the case of the SJ&H plan, an adoptive admission). Insofar as the objection rests on the point that application of the Equal Pay Act hinges on actual job content rather than the employer's evaluation, see *Hodgson* v. *Brookhaven Gen'l Hosp., supra,* 436 F.2d at 724, the evaluation is nonetheless evidence, and often exceedingly good evidence, of the actuality; if either party seeks to show the contrary, it is open to him to do so. The job descriptions, together with the supporting testimony of Edward Noble, were sufficient to sustain the Secretary's burden of proof on job equality.

the filing of this litigation. Other evidence also showed the inconsequentiality of this factor. Although some male inspectors on the night shift had at times been given the assistance of utility workers, Corning has always continued to pay all night inspectors at the same wage. Indeed, Corning's Manager of Job Evaluation, Edward Noble, conceded that "there is very little difference from shift to shift" in the performance of these inspection jobs. There is ample support for the district court's conclusion that the relevant jobs entail "substantially equal" work. Cf. *Shultz* v. *American Can Co.*, *supra*, 424 F.2d at 360-61.

We thus approve the district court's holding that when the Equal Pay Act took effect, Corning was violating it by paying higher base wages to the male night inspectors, and proceed to consider whether the violation has since been cured.

III.

Corning first contends that it cured its violation by opening the night shift to women in 1966 on what was clearly more than a token basis, but see note 6 *supra*. Although this argument seems persuasive at first blush, it must be rejected. Congress was quite specific how the injustice of unequal pay for equal work must be eradicated. Recognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor, see, *e.g.*, *Hearings on H.R. 3861*, *supra*, at 8 (statement of Secretary of Labor Wirtz), Congress declared that wage discrimination on the basis of sex "depresses wages and

living standards" of the many families dependent on the income of women. Equal Pay Act § 2, 77 Stat. 56. Consequently it provided that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women. This intention, clearly enough expressed in the proviso of 29 U. S. C. § 206(d)(1), that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee," received express emphasis from the legislators. "The only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." *Hearings on H.R. 3861 supra*, at 65 (statement of Representative Griffin); see also H.R. Rep. No. 309, *supra*, at 3 ("The lower wage rate must be increased to the level of the higher.")

In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration; in effect, Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially low wage rate not justified by any factor other than sex. We thus join with every other court of appeals which has considered the issue in holding that merely opening the higher paid jobs to women as vacancies arise is not sufficient to comply with the requirements of the Equal Pay Act. *Schultz* v.

American Can Co., supra, 424 F.2d at 359; *Hodgson* v. *Square D Co.,* 459 F.2d 805, 808-09 (6 Cir. 1972), *cert. denied,* 41 U.S.L.W. 3230 (Oct. 24, 1972); see also *Hodgson* v. *Miller Brewing Co., supra,* 457 F.2d at 226-27.

We come finally to Corning's contention that any violation was cured by the new collective bargaining agreement which became effective January 20, 1969. As previously indicated, this would clearly have been so if Corning had simply established a uniform day and night shift rate at least as high as the previous night shift rate, either with or without a plant-wide night differential. The problem stems from the "red circle" rate whereby any employee hired before January 20, 1969, receives a basic rate for night shift work some four to twelve cents per hour higher than for the day and afternoon shifts. Corning's contention that this is a differential based on seniority, another permitted exception, is belied by the fact that it is paid only for work on the night shift. We cannot disagree with the district judge, *Hodgson* v. *Corning Glass Works,* 330 F. Supp. 46, 50 (W.D. N.Y. 1971), that, on the facts of this case, "the 'red circle' rate paid to night shift inspectors perpetuates the discrimination of the 'supplemental escalating shift differential'"—the euphemism Corning has coined for the excess base wage rates paid to inspectors on the night shift.

We do not minimize the problems faced by Corning in changing policies originally resulting from New York law so that it will comply with the Equal Pay Act. It may well be that the wages originally paid the male inspectors on the steady night shift were more than the jobs were

worth and were paid only because Corning could not get the men to do this work for less than they were receiving for labor requiring more skill or effort. With the benefit of hindsight, Corning could have avoided this suit—and its back pay liability—by opening the night shift to women once the New York law was changed in 1953, when there was no legal obstacle to reducing the night rate, or, perhaps more realistically in light of union pressures, holding the night rate and gradually increasing the day rate until the two met, as was finally done, save for the "red circle" provision, in 1969. Even with the passage of the Act, however, Corning had ample time to restructure its wage rates to comply with the Act's provisions, for Congress postponed its effectiveness for one year, see Equal Pay Act § 4, 77 Stat. 57, in order to avoid the "severe hardship" immediate compliance might impose on employers. See S. Rep. No. 176, 88th Cong., 1st Sess. 5 (1963). But it did not do so, and upon the effectiveness of the Act, many of Corning's options were foreclosed by the proviso previously discussed. If the result here seems harsh in view of the efforts Corning has been making since 1966, the harshness is that which may be inevitable when a legislature demands a drastic change in discriminatory practices that had too long been accepted.

IV.

Not content with requiring the payment of back wages which, with interest, will exceed $600,000,[11] the district court issued a sweeping injunction, broadly incorporating

[11] Corning also challenges the district court's calculation of the amount of back pay due. We see no merit in this contention.

the words of the Act and applicable to all Corning plants (save that in Wellsboro, Pennsylvania), which we quote in the margin.[12]

We see no justification for this. Corning had been found to have violated the Equal Pay Act only with respect to one class of employee at its three plants in Corning, New York. As indicated, the violations were largely a result of the New York law which until 1953 had prohibited the employment of women at night. The Secretary's case was by no means impregnable, and Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring itself into compliance. There was no evidence of widespread violations of the Act, either at the Corning plants or its 26 branch plants nationwide. The evidence rather was that the only other cases where a similar violation might exist were the inspection jobs in the plant at Wellsboro, Pennsylvania, which was excepted from the injunction because of a pending suit by the Secretary, and in a plant at Central

---

[12] (1) The defendant shall not, contrary to section 6(d)(1) of the Act, discriminate on the basis of sex between employees employed within an establishment by paying wages to employees in such establishment at a rate less than the rate at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions:

(2) The defendant shall not, contrary to section 6(d)(1) of the Act, reduce the wage rate of any employee in order to comply with the provisions of section 6(d)(1) of the Act:

(3) The defendant shall not, contrary to section 15(a)(1) of the Act, transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any of its employees has hereafter been employed in violation of section 6(d)(1) of the Act:

(4) Defendants shall cease to withhold any amounts owing to any employee which have been withheld in violation of section 6(d)(1) of the Act.

Falls, Rhode Island, as to which the Secretary had also already instituted suit. Yet so broad an injunction put Corning under threat of contempt for any alleged violation of the Equal Pay Act in respect of any category of employee in all but one of Corning's many plants.

We agree with the point made by the Eighth Circuit, in another Equal Pay Act case, *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (1972), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nationwide injunction. Moreover, the Supreme Court has held that

> the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus to subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

NLRB v. *Express Publishing Co.*, 312 U.S. 426, 435-36 (1941). Since there is no showing here of the "proclivity for unlawful conduct" or "record of continuing and persistent violations of the Act" found to justify such an injunction in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949), the junction must be narrowed accordingly. While *Hodgson* v. *First Fed. Savings & Loan Ass'n*, 455 F.2d 818, 825-27 (5 Cir. 1972), relied on by the Secretary, may have been correctly decided on its own facts, we cannot subscribe, in the light of *Express Publishing* and our own views, to all that was there said.

The injunction is modified by eliminating paragraph (3) and limiting the remaining paragraphs to inspectors at the three Corning plants. As so modified, the judgment is affirmed. No costs.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
Defendant.

Civil 1967-29.

Appearances:

Francis V. LaRuffa, Chief Trial Attorney, and Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, United States Department of Labor, Attorneys for the Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel), Pittsburgh, Pennsylvania, for the Defendant.

The Secretary of Labor commenced this action under the provisions of Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217) to enjoin violations of Section 6(d) [29 U.S.C. § 206(d)] of the Act, and to restrain any withholding of payment of wages found by the court to be due to employees under the Act.

The plaintiff, George P. Shultz, Secretary of Labor, sues on behalf of all Class C, Class B, TV, and General TV inspectors working during periods pertinent in this lawsuit. Class B inspectors and Class C inspectors perform their functions in A Factory and in B & C Factory [also referred to herein as B Factory]. TV inspectors and General TV inspectors function in the Pressware plant.

This dispute arose because of the higher base wage rates paid to inspectors working the steady night shift who allegedly perform work equal to that performed by inspectors on the day and afternoon shifts. Prior to June 1, 1966, except during World War II, only female inspectors worked in the disputed jobs on the day and afternoon shifts, and only male inspectors worked on the steady night shift.

The defendant's employees represented by the plaintiff include both male and female inspectors in the various job categories. Those male inspectors who did inspection work on the day and afternoon shifts after June 11, 1964, the effective date of the Equal Pay Act, are damaged monetarily if the violation charged is proven because, absent a violation, the base rate for the day and afternoon shifts would equal the higher base rate paid at night.

Section 6(d), commonly known as the Equal Pay Act, was enacted on June 10, 1963, to be effective one year thereafter. Section 6(d)(1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed,

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

To carry its burden of proof, the plaintiff must establish by a fair preponderance of the evidence these elements:

(1) The disputed jobs entail equal work, that is, the performance of these jobs, under similar working conditions, require equal skill, effort, and responsibility;

(2) Within the same establishment, the defendant pays employees doing equal work a different wage rate;

(3) The different wage rates are paid on account of sex.

The four exceptions to the Act have been held to be affirmative defenses which must be pleaded and proven by a defendant-employer. *Wirtz* v. *Basic, Inc.,* 256 F. Supp. 786 (D. Nev. 1966). Finally, an employer may not decrease any employee's pay rate to come in conformity with the Act.

In its original answer, the defendant denied that the work performed by the men and women involved in this lawsuit was equal. After the trial, the defendant moved, pursuant to Rule 15 of the Federal Rules of Civil Procedure, for an order permitting it to amend its answer to conform to the evidence. The proposed amendments are: (1) "The payments made to steady night shift inspectors were and are based upon a factor other than sex;" (2) "To the extent that the complaint states a claim prior to November 1, 1964, it is barred by the statute of limitations." Defendant's motion to amend its answer is granted.

At the beginning of the trial, the parties stipulated that the statute of limitations barred all claims arising prior to November 1, 1964. Accordingly, any award for back pay should be computed commencing on November 1, 1964.

The court has considered the extensive memoranda of law submitted by the parties. What follows constitutes this court's findings of fact and conclusions of law.

Establishment

All three plants are separate, making different products. A Factory is engaged primarily in the production of pyrex products, B & C Factory in the production of optical products, and the Pressware plant in the production of television products.

A Factory and B & C Factory share an office building, are located back to back, and are connected by passageways. The Pressware plant is about one-half mile away from the other two.

Each plant is an independent manufacturing unit, having its own management and engineering staff and a separate payroll department.

A central employment office where all prospective employees make their original applications services all Corning area plants. As a particular plant needs new workers, a final pre-employment interview is conducted at the separate personnel office of the plant, where the decision is made to accept or reject the applicant for employment. After employment, an employee, by exercising his seniority rights, may transfer from one plant to another. However, a transfer from A Factory or B Factory to Pressware, or back to A Factory or B Factory from Pressware, is unusual since Class C and Class B inspectors work only in A Factory or B Factory, and TV and General TV inspectors work only in the Pressware plant.

Most employees at Corning, including the inspectors, are represented by the American Flint Glass Workers of North America, Local 1000. One collective bargaining agreement covers all Corning area plants. All payroll checks are written on a computer on information supplied by each plant.

The court finds that A Factory and B & C Factory constitute one establishment, and that the Pressware plant constitutes a separate establishment within the meaning of the Equal Pay Act. The reasons for this holding are that Pressware is separated from the other two plants, and because the inspectors do not transfer back and forth between the Pressware plant and the other two plants. *Phillips* v. *Walling*, 324 U.S. 490 (1944); *Mitchell* v. *Bekins Van & Storage Company*, 325 U.S. 1027 (1957), 29 CFR 800.108.

History

Steady night shift inspection jobs were added to existing rotating day and afternoon shift inspection jobs some time between 1925 and 1930, when the introduction of automatic production equipment made it necessary to inspect wares on three shifts. At that time, New York State law prohibited the employment of women between the hours of 10:00 P.M. and 6:00 A.M.[1] The defendant did not pay additional wages in 1930 as a shift differential. However, in order to obtain male employees willing to perform what was regarded by the male employees as female work, the defendant had to pay the male employees a higher rate than it paid female employees who performed inspection work on the day and afternoon shifts. This higher base rate for steady night work was never paid for inspection work on the day and afternoon shifts until January 20, 1969, when the company and the union agreed to equalize base rates on all three shifts with payments retroactive to November, 1968.

Beginning in the early 30's, some inspectors at some stations on the steady night shift performed their own "utility work" which entailed, among other things, carrying heavy loads from the end of the lehr. Similar work on the day and afternoon shifts was performed by utility workers assigned to assist the female inspectors.

Because of manpower shortages during World War II, the defendant employed some women as steady night shift inspectors. These female night inspectors performed their own utility work, including the moving of boxes, the trucking away of ware and the positioning of skids and boxes adjacent to the inspection area. They received a higher

rate of pay than the day and afternoon inspectors and the same rate paid to male night inspectors, if and when they performed all the work ordinarily required of a male night inspector.

After World War II, Corning returned to the prior practice of employing only males in the steady third shift inspection jobs.

In 1944, the American Flint Glass Workers Union of North America negotiated a collective bargaining agreement covering many production and maintenance employees of the defendant's plants located in Corning, New York. This contract covered the inspectors employed at A Factory, B & C Factory, and the Pressware plants, and it provided for a steady night shift wage differential as a premium for night work. This differential was applicable to inspectors as well as most other hourly employees of the defendant.

In addition to the steady night shift wage differential, this contract continued in effect the existing differential in base wage rate between the steady night shift inspectors and the rotating day and afternoon shift inspectors. Between the years 1944 and 1968, all collective bargaining agreements entered into by the defendant with the union have maintained similar wage differential structures with minor variations caused by negotiation of percentage rather than flat rate increases.

In 1953, New York State law was amended to provide, for the first time, that females over twenty-one years of age could work after midnight in factories operating multiple shifts, where the Industrial Commissioner found that satisfactory conditions exist and granted his approval.[2]

Similar provisions of the law have remained in effect during all times pertinent in this lawsuit.[3]

There is no evidence offered by either side that the Industrial Commissioner ever granted permission to the defendant to employ females on the steady night shift prior to June 1, 1966. From the fact that women actually worked the night shift inspection jobs after June 1, 1966, the court infers that the defendant obtained the necessary permission from the Industrial Commissioner. Further, the defendant has failed to offer any explanation of what, if any, efforts were made to obtain this permission at an earlier date.

Merger of Rate Schedules

Prior to June 11, 1964, the defendant maintained separate "male" and "female" rate schedules. Under these separate rate schedules, male inspectors working the steady night shift were paid a higher hourly base rate than the rotating day and afternoon female inspectors who were in the same job category, performing work rated substantially equal by defendant's own job evaluation plans.

Effective June 11, 1964, the defendant merged these separate schedules into one revised rate schedule. This merger, however, preserved the differential in base rate between the men and the women inspectors on all three shifts. This difference was preserved by placing the women into a lower labor grade on the revised rate schedule with a lower rate of pay.

A comparison of the separate schedules and the single revised schedule illustrates how the difference was maintained.

The female rate schedule dated November 19, 1962 indicates that a Class C female inspector was in group 3 (*i.e.*, the wage group of female employees whose jobs were evaluated between 215 and 235) and was paid $1.89 to $1.97-½. On the merged rate schedule, Class C female inspectors were classified as "new group" 1, and their rate of pay was $1.97-½.

The *male* rate schedule dated November 19, 1962 indicates that a Class C male inspector, working nights, was classified in wage group 2 (*i.e.*, that group of male employees whose jobs were evaluated between 165 and 235) and was paid $1.99 to $2.13-½. On the merged rate schedule, the former male rates were maintained by placing the Class C male inspector in "new group" 5, with rate range of $2.01-½ to $2.13-½.

The Class B inspectors and the General TV inspectors, male and female, were affected similarly by the merger of the rate schedules.

Therefore, the merger continued the historical difference in base hourly rates of the men and women inspectors working the three shifts. In the case of Class C and TV inspectors, the base rate differential between men and women inspectors was 16¢ an hour. For Class B and General TV inspectors, the hourly differential was 18¢. In the years after June 11, 1964, the hourly base rate differential was gradually increased.

Seniority Lists

Before June 1, 1966, defendant had maintained separate "male" and "female" seniority lists. In effect, these separate lists made it impossible for a female inspector to transfer into a steady night-time traditionally male inspection job.

Effective July, 1965, the Civil Rights Act mandated equal employment opportunities without regard to an employee's sex.[4] On May 31, 1966, the defendant abandoned its separate seniority lists, thus affording female inspectors an opportunity to take higher paid night shift inspection jobs as they became available. After June 1, 1966, a number of female employees availed themselves of the opportunity to use seniority to take the higher paying night shift inspection jobs. Of course, they also received the Corning-wide night-time differential provided by the collective bargaining agreement. Also since June, 1966, some men inspectors have taken day and afternoon inspection jobs with the reduced base hourly wage rate. This abandonment of the separate seniority lists was accomplished by mutual agreement between the union and defendant.

Equality of Work-Job Evaluation Plans: Admissibility and Analysis

In attempting to meet its burden of proving the equality of the disputed inspection jobs on all three shifts, the plaintiff has relied heavily on two job evaluation studies conducted by the defendant. These evaluation studies rate the disputed work equal on all three shifts.

In a pretrial statement analyzing the plaintiff's proposed exhibits and giving reasons for objections, which the court required the defendant to submit, no objection was made to Exhibits 34 to 41, and Exhibits 42 to 46 were objected to only on the grounds of relevancy and materiality. During the trial, the defendant objected only on the grounds of relevancy and materiality to the admission of plaintiff's Exhibits 34 to 46. In its post-trial memorandum, defendant for the first time raises additional objections to these exhibits, claiming that the records are hearsay, that they are not business records kept in the regular course of business, and that a proper foundation was not laid for their admissibility.

Since these grounds were not asserted definitely during the trial, the defendant has waived its right to object on these grounds. 2B Barron & Holtzhoff, Federal Practice and Procedure, § 1021, at pp. 309-319 (C.A. Wright rev. 1961). If the defendant's objection had been made clear at the time of trial, the plaintiff would have had an opportunity to clear up any deficiency which was present in the offer.

Furthermore, the purpose of Title 28, United States Code, Section 1732, the Federal Business Records Act, "is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making the reports." *United States* v. *New York Foreign Trade Zone Operators,* 304 F.2d 792 (2d Cir. 1962). "The statute was designed to bring the realities of business and professional practice into court in usable form . . ." *Korte* v. *New York, N. H. & H. R. R.,* 191 F.2d 86, 91 (2d Cir. 1951).

The records admitted were made and kept in the regular course of business of the defendant by trained observers following guidelines published by the defendant after a careful study had been made of the problems involved in evaluating the jobs. The job descriptions and evaluations were regularly used by the defendant in the course of its business and they were all prepared before the present litigation began.

Considering the purpose of the Federal Business Records Act, the reliability of these records was well established. Thus, defendant's objections to the admission of these exhibits is overruled.

It is necessary for the court to examine these studies to determine if the plaintiff has met its burden of proving equality of work.

The Stevenson, Jordan & Harrison Job Evaluation Plan [hereinafter referred to as the SJ&H Plan] was installed in 1946 and, according to the defendant, remained in effect until January 20, 1969. This evaluation plan measured skill, responsibility, and working conditions in evaluating the work performed in different job classifications. The defendant claims it was deficient since it did not take into account the amount of effort required in the performance of the jobs, or the time of the day the work was performed.

Further, defendant claims that the SJ&H Plan was never used to set wage rates because all base wage rates, including the separate male and female wage curves and the merged base rates, were the result of negotiation between the company and the union. In sum, the defendant contends, a higher base rate was negotiated for the male

inspectors on the steady night shift, in spite of the fact that the SJ&H Plan evaluated the work done under the same inspection classification equal on all three shifts.

The court is in accord with defendant's position that plaintiff cannot satisfy its burden of proof by relying on the descriptions used and the evaluation points determined in the SJ&H Plan. The Equal Pay Act requires that, for jobs to be equal, their performance must require "equal skill, effort, and responsibility," and must be performed "under similar working conditions, . . ." The SJ&H Plan did not measure effort. Therefore, the descriptions and evaluations prepared under this plan are insufficient alone to satisfy plaintiff's burden of proving the equality of the work.

The plaintiff also relies upon the Corning Glass Works Job Evaluation Plan [hereinafter referred to as CGW Plan], and the descriptions of the jobs made under this plan to satisfy its burden of proof.

The CGW Plan was developed over the years commencing in 1957. The CGW Evaluation Manual states that the purpose of the plan was "to establish equitable differences in pay between jobs based on job requirements, and further explains that "through the use of this system, equitable relationships will be established in terms of job evaluation points. When these points are applied to local wage curves, they will establish the rate range for any given job at that location." The CGW Plan measured effort, skill, responsibility, and working conditions. Like the SJ&H Plan, the CGW Plan does not take into account the time of day a particular job is performed.

The CGW Plan was first installed to establish wages in a branch plant in 1960 and, since that time, it has been installed at 24 branch plants. There was discussion between the company and the union in 1962 concerning its use at Corning. According to the defendant, this offer to use the plan in Corning was rejected by the union in 1962 and on five subsequent occasions. The reasons for the rejection by the union are unknown to the court. Nevertheless, in January, 1969, Corning and the union agreed that the CGW Plan would be the official job evaluation plan at Corning, with rates effective November, 1968.

Although the plan was not in effect until the latter part of 1968, the Industrial Engineering Department at Corning prepared descriptions of several of the jobs in question in this lawsuit and evaluated each of them in accordance with the CGW Plan during 1963 and early 1964. Under this plan, the work in most of the job classifications disputed in this lawsuit was evaluated as equal on all three shifts.

Defendant argues that plaintiff's use of the CGW Plan evaluation points and job descriptions also fails to satisfy plaintiff's burden of proof. It is defendant's claim that the job descriptions under this plan describe what an inspector is supposed to do, but do not actually describe the work he actually performs. Further, defendant argues that the CGW description and evaluation points are irrelevant prior to January, 1969 when the plan went into effect.

The testimony during the trial and the procedures set forth in the CGW "Guide for Describing And Evaluating" indicate that the first step in the evaluation procedure is an on-the-job observation of the work actually being per-

formed in a certain job classification. Job analysts, together with the employees actually performing the work and their superiors, collaborate in describing the work actually performed. Once this job description is finally drafted, it serves as the basis for job evaluation.

Under this plan, plant supervisors are responsible to report to the job analysts any significant changes in the work actually performed which might affect the originally drafted job description. Obviously, this requirement insures that job descriptions and the resulting job evaluations will be kept as current as possible and reflect the work that is actually being done within a job classification.

The court notes that no CGW job description of TV inspectors in Pressware was admitted in evidence. Further, the product line in Pressware changed in late 1968 resulting in a change in the CGW job descriptions that had been prepared for this plant (*i.e.*, General TV Inspector). Mr. Edward Noble, Manager of Job Evaluation at Corning, testified that the CGW description had been revised, but that this particular job still required equal work on all three shifts.

The defendant also argues that plaintiff may not rely on the CGW job descriptions to show that the jobs in question are equal under the Act, since the descriptions do not reflect the fact that some male inspectors on the night shift do their own utility work, while some female inspectors on the rotating day and afternoon shifts are assisted by utility workers. Utility workers move in-

spected material off the lehr, clean up around the inspection stations, pack ware and move it from the inspection area. They are required to exert more manual effort than the inspectors, but their jobs are evaluated at points lower than the inspectors in visual effort, skill, and responsibility.

Specifically, during the years 1964 to 1968, utility workers were assigned to help female day and afternoon inspectors in B Factory when Flameware was being manufactured. Flameware is a pyrex product which is manufactured from 12 to 20 weeks a year. During the years from November, 1964 to June, 1968, 120 female day and afternoon Class C and Class B inspectors worked in B Factory on Flameware. During these same years, as many as 10 and as few as 4 men had been assigned to perform this utility work during a particular year.

The analyst was instructed under the CGW Evaluation Manual to "cover the work normally performed on a regular basis and those duties which require special skills but are performed only occasionally." The analyst was further instructed that "it is not necessary for the description to include every task performed in the past or likely to be performed in the future."

The performance of utility tasks by some inspectors does not make the jobs unequal. In describing and evaluating the inspection jobs, defendant's analysts considered the untility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors. For each job classified, the job descriptions are the same on all shifts regardless of whether the work is performed by men or women. Since June 1, 1966,

women have been permitted to work on the steady night shift at the same wage rate as the male night inspectors. The conclusion that utility work by inspectors was incidental or "performed only occasionally" is borne out by the fact that defendant has always paid male steady night inspectors at the same rate, whether they performed utility work or not.

Because of these facts, the court concludes that the defendant over-emphasized the role of utility workers in assisting the women during the day and afternoon shifts, and put too much emphasis on the extra work done by the male inspectors during the night shift.

Furthermore, there is other evidence in the case to show the equality of the work. Although he qualified his testimony, Edward W. Noble, manager of job evaluation for the defendant, testified: "There is very little difference from shift to shift," in describing the jobs in question. He did not know what each and every individual did, but he was familiar with the jobs from occasional personal observation and from reports made by job analysts and plant managers who were instructed to report any significant job changes.

The court is satisfied that the most accurate description of what the inspectors actually did is provided by the thoughtful description of the job analyst made under the supervision of the job evaluation manager, in cooperation with the employee himself and his plant manager. Another reason for their reliability is that these studies were made before there was any hint of litigation.

To hear testimony from a fair sampling of the employees occupying all the disputed jobs on all shifts during the relevant time period would have consumed, in the court's best estimate, many trial days. And there is no reason to believe that the descriptions which the court could have interpolated from all this testimony would reflect the work actually done in any better fashion than the job descriptions drafted under the CGW Plan.

The defendant also argues that the CGW job evaluation is unreliable under Equal Pay Act standards because the time of day the work is performed is not considered in determining the relative similarity in working conditions. However, the defendant pays a Corning-wide differential for night work. In *Wirtz* v. *Dennison Manufacturing Co.*, 265 F.Supp. 787, fn.1 (D.Mass. 1967), the court said that "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work." This court is in accord that a differential such as the Corning-wide night differential adequately compensates employees for working undesirable times of day and, therefore, rejects the defendant's contention in this respect.

Finally, in a case brought under the overtime provisions of the Fair Labor Standards Act, the Supreme Court pointed out that "the employer . . . is in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680, 687 (1946). Here as in *Anderson*, the defendant is in the best position to

offer evidence and to explain why the results of its own job evaluation study should not be considered in determining the equality of work on all three shifts. The court concludes that the defendant has failed to offer any persuasive reason why the CGW descriptions and evaluation points should not be relied upon by the court.

Therefore, on all the testimony and exhibits before the court, the court concludes that the CGW job descriptions used for the jobs disputed in this lawsuit reflect the work that is actually being done within the meaning of the Equal Pay Act and the regulations promulgated thereunder. As a result of this, the court further concludes that the evaluation points assigned to the jobs disputed in this case are a valid reflection of the equality of the work performed.

Therefore, the court concludes that the work performed by the inspectors involved in this lawsuit and evaluated under the CGW Plan is equal on all three shifts and has been so since November, 1964, within the meaning of the provisions of the Equal Pay Act.

Affirmative Defense

The defendant, as one of its affirmative defenses, claims that the higher base rate paid steady night shift inspectors is "a differential based on any other factor other than sex." The defendant traces the history of the higher base rate on the steady night shift from its creation in 1930 to its final elimination in January, 1969. The circumstances causing the creation and perpetuation of the higher rate until 1969, the defendant argues, explains that the higher rate was a result of a "factor other than sex."

The creation of the night shift inspection jobs was brought about by the advent of automation in the glass manufacturing business. Inspection work had to be done on all three shifts.

In 1930, women had filled most, if not all, of the inspection jobs on the day and afternoon shifts. New York law did not permit women to occupy night shift jobs. As the defendant explains it, men were less than enthusiastic in accepting steady night shift inspection work which they regarded as "women's work."

In addition, the men who were to fill the newly created night inspection positions had been working in the blowing room where they received incentive pay. With their average incentive pay added to their regular wage, they could earn more than the company was paying for inspection work on the day and afternoon shifts.

Because of these factors, it was necessary to pay men a higher rate than women for the night inspection work.

This "differential" in base rate was continued as a result of negotiation until January, 1969, even though the first union contract in 1944 provided for a Corning-wide night shift differential. Prior to June 1, 1966, only male inspectors worked the night shift and received this differential in base rate, plus a night shift differential.

The night shift differential was originally 5¢ an hour and reached 12¢ an hour in 1958. The steady night shift differential represents compensation for the undesirable hours of this shift, which begins at 10:00 P. M., 11:00 P. M., or midnight.

For purposes of this litigation, the defendant has called the differential in hourly base pay a "supplemental escalating shift differential." This term is not used in the agreements and defendant's supervisors who testified had never heard of it and did not understand what it meant.

Citing the interaction between the company and the union, the fact that New York law prohibited night work by women for a long period of time, and the original reasons why a differential in base rate was necessary, the defendant attempts to justify the higher night shift base rate paid to men after June 11, 1964. The court, however, is not persuaded that paying a higher steady night shift rate, a "supplemental escalating shift differential," is justifiable after the effective date of the Equal Pay Act.

The Act was passed in June, 1963 to be effective with respect to defendant's employees in June, 1964. Thus, the defendant had a full year to implement compliance. As of 1953, New York State had lifted its absolute ban on night work by women. As of that year, women could have occupied night work positions if approval by the Industrial Commissioner was sought and obtained. And, although the original basis for the higher base rate on the steady night shift may have been reasonable in 1930, this higher rate could not, in the court's view, be legally maintained under circumstances in this case after the effective date of the Equal Pay Act.

Therefore, the defendant has failed to carry its burden of establishing, by a fair preponderance of the evidence, that the higher steady night shift differential was based on "any other factor other than sex."

Summary

The court concludes that the work performed by the Class C and Class B inspectors in A Factory and B Factory and the work performed by the General TV inspectors in Pressware was equal on all three shifts from November 1, 1964 until January, 1969, and that the higher base rate paid the steady night shift inspectors was maintained after June 11, 1964 on account of sex, in violation of the Equal Pay Act. The court further concludes that the effect of this violation persisted after June 1, 1966. Finally, the Court concludes that the higher base rate paid night inspectors was not based on any other factor other than sex.

At the trial, the court deferred consideration of the amount of wages allegedly due the day and afternoon inspectors involved in this case. In light of the above findings of fact and conclusions of law, the defendant is restrained from withholding the payment of wages due for the period from November 1, 1964, to November, 1968, when the inspection base rates were equalized for all three shifts by the January 20, 1969 agreement.

The "supplemental escalating shift differential" in base rate shall be the basis for computing the wages due the Class C and Class B inspectors in A and B Factories and the General TV inspectors in Pressware. There shall be no award for TV inspectors in Pressware.

The parties shall attempt to agree upon the correct amount due for each employee affected by this decision. If the parties cannot agree on the amount of the judgment within a period of sixty days, or such further time granted by order of the court, then the plaintiff shall move

on notice for an accounting by a Master to be appointed by the court.

The plaintiff may at any time renew his application for the issuance of further injunctive relief which may be equitable under the circumstances of this case. Presently, the court has refrained from issuing such further injunction because the inspection rates on all shifts have been equalized by the January 20, 1969 agreement.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: July 10, 1970.

FOOTNOTES

[1] Law of March 30, 1927, ch. 453, § 172, [1927] N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 [1930] N.Y. Laws (which carried forward, without change, the prohibition against night work by females).

[2] Law of April 13, 1953, ch. 708, § 172, [1953] N.Y. Laws (which amended section 172 to allow, for the first time, night work for females upon approval by the Industrial Commissioner).

[3] During the period pertinent in this lawsuit, New York Labor Law, Section 173(3)(a)(1), effective October 1, 1963, carried forward the effect of the 1953 amendment allowing night work by females after the required approval. N.Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

[4] Civil Rights Act, 42 U.S.C.A. § 2000 e-2 (1970) (statute effective one year after July 2, 1964).

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, [Successor to George P. Shultz, Resigned],

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil 1967-29

Appearances:

Francis V. LaRuffa, Regional Solicitor, and Isabelle R. Cappello, Assistant Counsel for Trial Litigation, United States Department of Labor, for Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel) Pittsburgh, Pennsylvania, for Defendant.

Plaintiff brought this suit under the provisions of Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217) to enjoin violation of Section 6(d) of the Act [29 U.S.C. § 206(d)], and to restrain the withholding of payment of wages found by the court to be due to defendant's employees under the Act.

After a trial, this court filed a decision on July 10, 1970,[1] ruling that the work of the Class C, Class B, and General TV inspectors was equal on all shifts within the meaning of the Act, that the payment of a lower rate to the day and afternoon shift inspectors was sex-based and illegal, and that men as well as women were damaged monetarily when, after June 1, 1966, men worked at the previously all-female day and afternoon inspector jobs at a reduced base hourly wage rate. During that trial, defendant described the sum paid to night shift workers which was in addition to the regular night shift differential paid to all night workers as a "supplemental escalating shift differential." The court ordered that restitution be paid in that amount to the employees affected from November 1, 1964 until the end of November, 1968. Injunctive relief after that date was denied because, at the time of filing that decision, the court was of the opinion that the rates of all inspectors had been equalized on all shifts by a collective bargaining agreement entered into between the defendant and the Union on January 4, 1969.[2]

On July 17, 1970, plaintiff promptly moved to amend the findings of the court on the ground that the inspection rates on all shifts had not been equalized by the collective bargaining agreement.[3] To determine the impact of this agreement upon the wages paid to men and women inspectors on the three shifts, further extensive interrogatories and requests for admissions were filed and answered. In addition, on May 10, 1971, the court heard further testimony. The following constitutes the court's amended and supplemental findings of fact and conclusions of law.

Plaintiff and defendant are generally in agreement about the facts, but sharply dispute the conclusion which the

court should draw from these facts. After considering the evidence presented, it is clear now that the court's prior decision that the January, 1969 agreement equalized the rate paid on all shifts to the inspection jobs after November, 1968 was in error.

During November and December, 1968, defendant and Local 1000 of the American Flint Glass Workers Union of North America negotiated a new collective bargaining agreement which was entered into on January 4, 1969. The agreement provided for certain retroactive wage boosts effective in November, 1968. The parties agreed that the Corning Glass Works Job Evaluation Plan, which the court relied upon in its original decision, would become effective on January 20, 1969.

Because the parties are not in dispute about the terms of the agreement or the wages which will be paid as a result of it, it is not necessary to detail the complicated formula used by the parties to set the rates, but, to understand the argument, it is important to summarize the results of the agreement.[4]

The Corning Glass Works Evaluation Plan rated the inspection jobs at issue in relation to the other jobs in the defendant's plant in a fair, non-discriminatory manner not based upon sex. It abolished the separate wage rates for day, afternoon, and night shift inspectors, increased the rate of all inspector jobs, day and night, so that the resulting wage was the same in all three shifts. Further provisions in the agreement, however, resulted in the payment of a higher rate at night to every person employed before January 20, 1969. Because of this "red circle" provision in the agreement, all Class C, Class B, and General

TV inspectors (until this job was discontinued in December, 1969) working on the steady night shift have continued to receive a higher base wage rate—in addition to the plantwide night shift differential—than their counterparts of comparable seniority working on the day or afternoon shifts. Men or women may work the night shift but, when they transfer to the day or afternoon shifts, they receive less pay. This "red circle" or "protected" rate will not be paid to employees hired after January 20, 1969. However, up to May 10, 1971, the date of the hearing, no one hired after January 20, 1969 had worked at one of the night inspection jobs. It will be some time before the "red circle" rate will be phased out, because there are about 500 employees currently on lay off who must be offered an inspection job before it can be offered to a new employee.

The Company claims that the "red circle" rate was needed because of a policy to protect the rate of a senior employee when his job is reclassified at a lower rate. The Company specifically referred to that section of the agreement which provides that, when "job evaluation . . . results in wage brackets lower than prevailing rates then paid for the job, it is not the intention of the Company to reduce the prevailing base rates of employees currently working on such jobs."[5] A complicated formula in the agreement put this general statement into practical effect, with the result that the night inspection job previously receiving a "supplemental escalating shift differential" now received a "red circle" or "protected" rate. The amount of the "red circle" rate is smaller than the "supplemental escalating shift differential" but the result of this plan was to continue the prior practice under another name.

In its original decision, the court ruled that, from June, 1964 continuing through June 1, 1966, when women first worked on the night inspection jobs, until November, 1968, day and afternoon inspectors were entitled to be paid the "supplemental escalating shift differential."[6]

If the day and afternoon inspectors had been paid this amount before November, 1968, in January, 1969 when the new agreement was entered into, the day and afternoon inspectors would have received the benefit of the "red circle" rate in the same way that the night shift inspectors did. To state it in another fashion, if defendant had been in compliance with the Equal Pay Act on June 11, 1964, all inspectors would have been paid at the same rate in January, 1969, and all would have received the same increase when the agreement went into effect.

Defendant insists that seniority and not sex discrimination is the reason for the extra pay. Defendant alludes to the fact that both men and women have received the "red circle" protection; that, when women who have been employed before January 20, 1969 work the night shift, they receive the "protected" rate and, when men work the day shift, they work at the reduced rate.[7] Furthermore, defendant contends that the formula for the "red circle" protection depended upon the payment made to inspectors immediately before the agreement was reached. Since both men and women worked as night inspectors from June, 1966, the defendant's argument is that the "red circle" rate is derived from a wage paid to women as well as men.[8]

However, the court has already found that the payment of the "supplemental escalating shift differential" during

the period June, 1966 to November, 1968 was sex based and a violation of the Act. The rates paid during that period were the result of a longstanding practice to pay a lower rate to female inspectors who, for many years, worked only the day or afternoon shifts.[9] During the hearing, defendant admitted that there is an historical connection between the "red circle" rate and the prior "supplemental escalating shift differential."

It is appropriate to apply the principles growing out of the cases arising under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000(a)(2)] to Equal Pay Act cases, since the purpose of both Acts is to eliminate employment discrimination. *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (3d Cir.), cert. denied, 398 U. S. 905 (1970).

Assuming that the formula for payment of wages after January 20, 1969 is a neutral employment practice, one to protect the rate paid to senior employees, nevertheless, if the result of this formula perpetuates past discrimination, it will not be permitted. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), a Title VII action, at page 430, the Supreme Court said:

> "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

See also, *United States* v. *Bethlehem Steel Co.* (2d Cir.), decided June 21, 1971. In that action under Title VII of the Civil Rights Act, the court ordered rate retention for a group which had been discriminated against in employment opportunities. The court explained that it did so "so that the effects of past discrimination would not be perpetuated."

The court finds that, in this case, the "red circle" rate paid to night shift inspectors perpetuates the discrimination of the "supplemental escalating shift differential." The "red circle" rate is not a valid "red circle" rate under the Equal Pay Act. 29 C.F.R. § 800.146.

In order to eliminate the discriminatory rate paid to day and afternoon shift inspectors, the Company shall pay the "red circle" rate to them as well as to night shift inspectors. Defendant is restrained from withholding the payment of wages due for the period from November 1, 1964[10] until the date it equalizes the rate paid to the various inspectors. The basis for computing the wages due shall be equivalent to the "supplemental escalating shift differential" and the "red circle" differential, depending upon the time period involved. The parties shall attempt to agree upon the correct amount due each employee affected by this decision. If they cannot agree upon the amount of the judgment within a period of sixty days, then the plaintiff is directed to move promptly, on notice, for an accounting by a Master to be appointed by the court. At the same time, the parties are directed to attempt to agree upon the manner of distribution of the award to the employees.

In the court's original decision, the plaintiff's application for an injunction, pursuant to Section 17 of the Fair Labor Standards Act, restraining future violations of the Act was denied with leave to renew. The court is now satisfied that the plaintiff is entitled to this relief. The defendant has been in violation since June 11, 1964. Since January, 1969 when the Company entered into the new agreement, it continued to pay the past discriminatory rate. The Company admits that a similar plan for the payment of inspectors was in force in at least two other plants and,

in at least ten plants of the twenty-six, up to May, 1965 it continued to have separate male and female rate schedules. Furthermore, the present collective bargaining agreement at the Corning plant expires on January 20, 1972. Whatever new agreement is entered into, it is important that the negotiations be carried out with the understanding that future violations of the Act may be the subject of contempt proceedings.

Under these circumstances, an injunction should issue for the purpose of the Act is to "correct a continuing offense against the public interest," not simply "to collect a debt owed by an employer to an employee." *Wirtz* v. *Jones*, 340 F. 2d 901, 904 (5th Cir. 1965). The injunction merely directs what the employer is required to do by law. It places no additional burden on the Company, but it relieves the heavy burden placed upon the Department of Labor to conduct a widespread investigation of defendant's operation. See *Wirtz* v. *Harper Buffing Co.*, 280 F. Supp. 376, 382 (D. Conn. 1968), aff'd without opinion, 2d Cir. September 17, 1968, Dkt. No. 32167; *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938 (2d Cir. 1945); and *Hodgson* v. *Ricky Fashion, Inc.*, 434 F. 2d 1261 (5th Cir. 1970).

In addition, to carry out the purpose of the Act, the injunction issued must be company-wide. Since the discriminatory practice was allowed to continue at the Corning plant, the court believes that, in other plants not under the pressure of investigation or litigation, the Company would not strenuously endeavor to correct similar discriminatory practices. *Wirtz* v. *Beneficial Finance Co. of Wisconsin*, 346 F. 2d 340 (7th Cir. 1965). The court directs that the defendant Company at Corning and at all branch plants,

except the branch plant at Wellsboro, Pennsylvania where an action has been filed and a trial is likely in the near future, its officers, employees, and those in active concert with them are enjoined from future violations of the Act.

Interest shall be paid on the amounts withheld at the rate of 6% from the median date of employment. In *Hodgson* v. *American Can Co.—Dixie Products,* 440 F. 2d 916, 922 (8th Cir. 1971), the court explained the reason for the award of interest:

> ". . . In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties. Rodgers v. United States, 332 U. S. 371, 68 S. Ct. 5, 92 L. Ed. 3 (1947). Clearly the award of back wages under the Fair Labor Standards Act is remedial in nature. 29 U.S.C. §202(b). . . . The purpose of the award is to compensate the employees for the loss sustained because of the wrongful withholding of wages. While the good faith of the employer is one of many factors to be considered, '[t]o make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable.' . . .
>
> From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use. The interest should be allowed from the dates of the underpayment. . . ."

Similar considerations require the awarding of interest in this case.

So ordered.

JOHN T. CURTIN,
John T. Curtin,
United States District Judge.

Dated: August 3, 1971.

---

[1] *Shultz* v. *Corning Glass Works*, 319 F.Supp. 1161 (W.D.N.Y. 1970).

[2] *Id.* at 1171.

[3] Since July 10, 1970, other motions were also presented to the court. On December 2, 1970, the defendant's motion pursuant to Rule 19 of the Federal Rules of Civil Procedure to add the local and international unions as defendant parties was denied. A motion by plaintiff to include TV inspectors in the award was similarly denied.

[4] Defendant pays the following rates to employees employed on or prior to January 20, 1969 who work as Class B and Class C inspectors:

BASE RATE RESULTING FROM AGREEMENT OF

	11/1/67 through 1/5/69	1/4/69 through 11/2/69	11/3/69 through 1/4/70	1/5/70 through 11/1/70	11/2/70 through 1/3/71	1/4/71 through Present
Class B, night shift	$2.575	$2.80	$2.92	$2.95	$3.07	$3.10
Class B, day and afternoon shifts	2.37	2.68	2.80	2.83	2.945	2.975
Differential	.205	.12	.12	.12	.125	.125
Class C, night shift	2.46	2.68	2.80	2.83	2.945	2.975
Class C, day and afternoon shifts	2.29	2.64	2.76	2.79	2.90	2.93
Differential	.17	.04	.04	.04	.045	.045

The agreement provided that an added retroactive sum payment be made for the period between November 4, 1968 and January 6, 1969. The sum was based on the rate of the employee's job on January 6, 1969. The arrangement was arbitrary and temporary. Plaintiff does not request that a recomputation be made for this period, and none is ordered by the court.

[5] Agreement, Corning Glass Works and American Flint Glass Workers' Union of North America, A.F.L.-C.I.O., January 4, 1969, Article XV, Section 2.

[6] 319 F.Supp. at 1171.

[7] There is no question that women as well as men have the opportunity to work at night. Between January 20, 1969 and December 27, 1970, 140 males and 274 females filled 524 vacancies on Inspector Class B jobs on the day and afternoon shifts in A and B Factories. Similarly, 72 males and 80 females filled 179 vacancies on the steady night shift. In the Pressware Plant, 56 males and 158 females filled 380 General TV Inspector vacancies on the day and afternoon shifts, while on the steady night shift 39 males and 46 females filled 114 vacancies.

[8] Defendant further argues that the January, 1969 agreement does not violate the Act because no rates were reduced, that, instead, the rates of all inspectors were increased. For example, an employee who was performing any of the three inspection jobs on the steady night shift under the wage rate in effect prior to January 4, 1969, and who transferred to the day shift under the wage rate in effect after January 4, 1969 received a wage increase, not a decrease, as a result of the agreement.

This argument is obviously without merit. To find out whether rates are discriminatory, they must be compared on the same day, not on the day before and the day after an increase.

[9] 319 F.Supp. at 1164-65.

[10] The parties agree that the statute of limitations bars relief prior to November 1, 1964. *Id.* at 1163.

APPENDIX D

Congressional Record—House

• • • matter. Congress delegated that authority to write regulations, to write the law, so do not question that. We are not even considering that here."

That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor even to issue interpretative regulations.

I emphasize that interpretative regulations are also barred. Interpretative regulations involve a case where there is an ambiguity in the law which admits of two or more constructions. Then in that case, if we have given interpretative regulatory authority, the Secretary moves in and tries to say what we meant between the two or three constructions. He does not have such authority here. The Secretary, in my opinion, has the inherent authority to write interpretative bulletins. All this amounts to is telling the public the Secretary's interpretation of the law for the guidance of those who are to be regulated. Such bulletins have no standing in court, but they are there as a guidance to the court as to what the view of the administrator was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected. He is not in violation if he has done something in reliance upon those interpretative bulletins.

One final point, I would like to ask the gentleman from Michigan [Mr. O'HARA], if I may, to respond to this.

We have been concerned here in a situation where an employer is bound by an existing agreement as to a wage differential. The Labor Department and the courts say that agreement violates this act—it discriminates against women. It is my view, and I think it is the view of the gentleman from Michigan and the view of our subcommittee that this bill as now written obligates the union and gives the union the responsibility to negotiate in this case to eliminate the discrimination and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this act.

Mr. O'HARA of Michigan. Mr. Chairman, will the gentleman yield?

Mr. GOODELL. I yield to the gentleman.

Mr. O'HARA of Michigan. Mr. Chairman, the language of the bill on line 7, page 3, reads:

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

It is my understanding, as it is the understanding of the gentleman from New York that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.

Mr. GOODELL. I would stress the word "maintaining" in your reply, because we feel that the words "shall cause

or attempt to cause" put an obligation on a labor union, as well as the employer, to change that existing agreement, if the agreement is in violation of this act and this requires the employer to violate the act. Does the gentleman agree?

Mr. O'HARA of Michigan. I would agree. Not only does it refer to new agreements but to an existing agreement where a labor organization would attempt to maintain a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act.

Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

First. Differences in pay that exist between women alone are not covered by this act.

Second. Differences in pay that exist between men alone are not covered by this act.

Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act.

Fourth. Only those jobs that are the same and normally related shall be compared.

Fifth. Normally the jobs that are compared will be physically located in the same work area or will fall within closely related job classifications.

Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination.

Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.

Tenth. A difference in pay between male selectors and packers and female selectors and packers who work on the same production line and have the same duties and responsibilities would be invalid.

Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off of the assembly line, or sweep up the room or work on the loading dock during slack periods.

Twelfth. An installer's job on an assembly line that, for example, requires soldering could not be compared or equated with a welder's job.

Thirteenth. A truck driver's job and a tug operator's job are dissimilar.

Fourteenth. The work of a machine operator and the work of a skilled machinist cannot be equated.

Fifteenth. Plant and office clerical assignments are normally distinguishable.

Mr. Chairman, the majority views and supplemental views, follow:

Equal Pay Act of 1963—Majority Views and Supplemental Views

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an equal pay for women policy.

During the 87th Congress the Committee on Education and Labor considered a number of equal pay bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on equal pay legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

109 Cong. Record, House, May 23, 1963

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of equal pay legislation and submitted a draft bill.

These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

109 Cong. Record, House, May 23, 1963

PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act.

The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to complement the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few, if any, new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management contracts, enforcement is deferred for 1 additional year or until the termination of the contract whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would

expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in black brackets, existing law in which no change is proposed is shown in roman):

SECTION 6 OF THE FAIR LABOR STANDARDS ACT OF 1938

"SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

"(2) if such employee is a homeworker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate

prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor, or his authorized representative, shall have power to make such regulations or orders, as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such homework employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term 'homeworker'; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by homeworkers;

"(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the

special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection.

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate

prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement).

"(c) The rate or rates provided by subsection (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5: *Provided,* That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any

such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with

the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

"[(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"[(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"[(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"[(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.]"

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantia amended during consideration on the House floor. Ho ever, the administration this year adopted only a few the changes made on the floor last year. Its proposal w embodied in H.R. 3861. On March 25 Congressman Go ELL introduced a new proposal, H.R. 5605, to place adm istration and enforcement of equal pay legislation un the Fair Labor Standards Act. Virtually all of the p posals of the Goodell bill were accepted by the House s committee, and are now embodied in H.R. 6060.

Since this bill now before the House differs substantia from either last year's proposals or this year's administ tion bill, we feel that these changes should be pointed o The following are the major differences between the reported by the full Education and Labor Committee a the earlier administration proposal. Under the commit bill:

1. The prohibition against discrimination because of is placed under the present Fair Labor Standards A with the act's established coverage of employers and e ployees.

2. All of the fair labor standards exemptions ap Agriculture, hotels, motels, restaurants, and laundries excluded. Also, all professional, managerial, and adm istrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under existing Wage and Hour Division, thus avoiding the c tion of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

PETER FRELINGHUYSEN, JR
WILLIAM H. AYRES.
ALBERT H. QUIE.
CHARLES E. GOODELL.
ALPHONZO BELL.

The CHAIRMAN. The time of the gentleman has expired.

Mr. RYAN of New York. Mr. Chairman, I support H.R. 6060, the equal-pay-for-equal-work bill.

I should like to commend our colleague, the gentlewoman from Oregon, EDITH GREEN, for her role in advancing this legislation. She has introduced equal pay bills ever since her election to the House. Last year she sponsored the administration bill for equal pay. As a member of the President's Commission on the Status of Women, the gentlewoman from Oregon [Mrs. GREEN] has worked with dedication and determination to see that women receive equal treatment with men in employment.

Mr. Chairman, I support this bill to provide justice in the pay envelope to both men and women by forbidding employers in interstate commerce to discriminate among their employees on the basis of the sex of the worker in setting rates of pay.

Discrimination in the form of a rate differential for comparable work when performed by women instead of men is based on the incredible notion that a woman, although she may accomplish as much or more, deserves less pay than • • •

FILE COPY

FILED
AUG 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Petitioner.

Of Counsel:

WALTER P. DEFOREST,
DANIEL I. BOOKER,

REED SMITH SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7469

INDEX.

	PAGE
Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit	1
Appendix E	5

CITATIONS.

CASES:

Brennan v. Corning Glass Works (3rd Cir. June 28, 1973) (App. E, *infra*, not yet officially reported)	2
Hodgson v. Corning Glass Works, 474 F.2d 226 (2nd Cir. 1973)	1
Hodgson v. Corning Glass Works, 341 F. Supp. 18 M.D. Pa. 1972), *aff'd sub nom. Brennan v. Corning Glass Works* (3rd Cir. June 28, 1973) (App. E, *infra*, not yet officially reported)	1, 2
Hodgson v. Corning Glass Works, Civil No. 4036 (D. R.I., filed November 21, 1968)	3

STATUTES:

Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963)	2
Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.* (1938)	2

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Corning Glass Works, Petitioner herein, on June 29, 1973, filed its Petition for Writ of Certiorari which seeks review of the judgment of the United States Court of Appeals for the Second Circuit in this case. 474 F.2d 226 (2nd Cir. 1973).

Petitioner pointed out, in its Petition for Writ of Certiorari at p. 8, that the decision below was in direct conflict with the decision of the district court in *Hodgson v. Corning Glass Works,* 341 F.Supp. 18 (M.D. Pa. 1972), a case then pending before the United States Court of Appeals for the Third Circuit.

After filing the Petition for Writ of Certiorari with this Court, Petitioner received the opinion of the United States Court of Appeals for the Third Circuit in the case of *Brennan* [*Hodgson*] *v. Corning Glass Works*[1] (App. E, *infra*, not yet officially reported) which affirmed, without dissent, the decision of the district court in *Hodgson v. Corning Glass Works*, 341 F. Supp. 18, *supra*.

The decision below is in direct conflict with the decision of the Third Circuit in *Brennan* [*Hodgson*] *v. Corning Glass Works, supra* (App. E, *infra*). The conflicting cases involve the same parties and the conflict is square with respect to the issue of whether work at night is performed under a "working condition" similar to work during the day, within the meaning of the equal pay provisions[2] of the Fair Labor Standards Act (the "Act").

The precise contention accepted by the court below as a basis for its decision—*viz.*, that work on a steady night shift is not a "working condition" within the meaning of the equal pay provisions of the Act—was rejected by the Third Circuit in *Brennan*, in these terms:

> "We conclude, then, that time of day worked is a 'working condition' within the meaning of the Equal Pay Act and not merely a 'factor other than sex' to be used by an employer as a matter of defense.
>
> "Therefore, in the circumstances of this case, the statute is inapplicable. Because of this conclusion, we need not and do not decide Corning's other contentions, urged to support affirmance of the district court's judgment." [footnotes omitted] (App. E, *infra*, p. 18).

---

[1] The Third Circuit substituted the name of the present Secretary of Labor in the caption of the case.

[2] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963), *amending* Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* (1938).

This issue, as to which the conflict exists, is a threshold jurisdictional issue essential to the application of the Act. If the Second Circuit erred in regard to this issue, the decision below cannot be sustained upon any other ground.

Further, the conflict between the Second and Third Circuits can be effectively resolved only by action of this Court. The Secretary of Labor filed a Motion for Stay of Mandate which was granted by the Third Circuit. In that Motion the Secretary of Labor stated its intention to petition this Court for a writ of certiorari to review the decision of the Third Circuit.

Corning is caught in a disagreement between the Second Circuit and the Third Circuit in respect to the proper application of the equal pay provisions of the Fair Labor Standards Act. This is particularly discomforting because a similar lawsuit has been filed by the Secretary of Labor against Petitioner raising, *inter alia*, the identical question which remains unsettled as a result of the differing decisions cited above. That case, *Hodgson v. Corning Glass Works*, Civil No. 4036 (D. R.I., filed November 21, 1968), has been held in abeyance pending the outcome of the litigation in the Second and Third Circuits. If this Petition for Writ of Certiorari is not granted, the Rhode Island case will eventually be litigated in the United States Court of Appeals for the First Circuit.

The instant Petition also presents to this Court two other important issues, set forth at Questions 2 and 3 of the Petition, relating to the proper means of remedying alleged violations of the Act. These issues have never been considered by this Court, and they are of potential importance to all employers and employees covered by the Act.

This is a supplemental brief in support of our Pet for Writ of Certiorari, and we respectfully request the reasons set forth in our Petition be considered, in junction with the information set forth above, and tha Petition be granted.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15
Attorney for Petitioner.

Of Counsel:

WALTER P. DEFOREST,
DANIEL I. BOOKER,

REED SMITH SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

Appendix E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix E—Opinion of the Third Circuit Court of Appeals in *Brennan v. Corning Glass Works* (June 28, 1973) (not yet officially reported).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1590

PETER BRENNAN, Secretary of Labor,
United States Department of Labor,
Appellant,

v.

CORNING GLASS WORKS, a Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 69-396)

Argued Monday, May 21, 1973
Before KALODNER, ALDISERT and ADAMS, *Circuit Judges*

RICHARD F. SCHUBERT,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
DONALD S. SHIRE,
HELEN W. JUDD,
ISABELLE R. CAPPELLO,
Attorneys,
U. S. Department of Labor,
Washington, D. C.,
SYLVIA S. ELLISON,
Attorney,
LOUIS WEINER,
Regional Solicitor.

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST,

REED SMITH SHAW & McCLAY,
Pittsburgh, Penna. 15219,

ROBERT F. COX,
COX, WILCOX, OWLETT
& LEWIS,
Wellsboro, Penna. 16901,

Counsel for Appellee,
Corning Glass Works.

Opinion of the Court

(Filed June 28, 1973)

ADAMS, *Circuit Judge.*

This action was commenced by the Secretary of Labor to enjoin claimed violations of the equal pay provisions of the Fair Labor Standards Act[1] and to restrain the withholding of wages allegedly due certain female employees. The broad issue presented for the Court's judgment is whether Corning Glass Works engaged in wage discrimination violative of the Equal Pay Act[2] by paying more to *night* inspectors than to *day* inspectors at its Wellsboro, Pennsylvania plant.

---

[1] 29 U.S.C. § 201 *et seq.*

[2] The equal pay provisions were added to the Fair Labor Standards Act as an amendment to § 6(d) of the Act. Enacted by Congress in 1963 to correct certain conditions considered contrary to the country's interest, the Equal Pay Act provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less

(Footnote continued on following page)

The basic factual pattern involved in this case implicates the Equal Pay Act because, for reasons that will be fully explained, *infra*, before October 16, 1966, night inspection work was performed exclusively by males and day inspection work largely by females. Thus, the Secretary asserts, in essence, that Corning paid male night inspectors more than female day inspectors for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."[3] The district court disagreed, and the case is now here on appeal.

I.

The pay practices at the heart of this controversy developed over a period spanning more than forty-five years. Before 1925, Corning operated its Wellsboro Plant only during the day, finding it either unnecessary or undesirable to employ a night shift. All inspection work at that time was performed by women. The introduction of automated production equipment between 1925 and 1930, however, made it necessary or desirable for the first time to use night shifts.

(Footnote continued from preceding page)

than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or equality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

[3] 29 U.S.C. § 206(d)(1).

Until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of midnight and 6:00 A.M.,[4] and thus, in order to fill inspector positions on the new steady night shift, Corning had to hire men. These night inspectors, selected from male employees within the plant, were paid for their night inspection work the individual rates they had previously been receiving. Such wages were higher than the rates paid to women engaged as inspectors on the day shift. A situation thus developed in which male inspectors worked at night, female inspectors during the day, and the male employees were paid at higher rates.[5]

This wage differential was reinforced when, in 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of Corning's Wellsboro Plant and negotiated a collective bargaining agreement providing, for the first time, a plant-wide night shift differential. Despite this new *shift* differential, serving as a premium for night work, the pre-existing *wage* difference between night shift inspectors and day shift inspectors continued in effect.[6]

In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor.[7] Under the applicable regulations, however, Corning could have employed women at

---

[4] Act of July 25, 1913, P.L. 1024.

[5] After installation of the Stevenson, Jordon & Harrison wage evaluation plan in 1947, for example, the resulting wage differentials between the night and day shifts amounted to a high of 19 cents an hour, in addition to the shift differential of 4 cents an hour for the afternoon shift and 10 cents an hour for the night shift. By 1966, the highest base wage differential was 22½ cents an hour.

[6] See note 5, *supra*.

[7] Act of May 21, 1947, P.L. 389, § 4.

night only if it would provide them transportation or if Wellsboro had public transportation. It was not economically feasible for Corning to furnish transportation to its female employees, and public transportation was unavailable. The 1947 state regulations were later amended in July, 1965 to permit night work for those women who had regular, private transportation.[8]

Since October 16, 1966, by mutual agreement between the union and Corning, women have been permitted to exercise their seniority, on the same basis as men, to claim steady night shift jobs when vacancies occur.[9] A considerable number of female employees have availed themselves of this opportunity to take the higher-paying night shift inspection jobs.[10] In addition, several new female employees, as well as a new male employee, have been hired to work as night inspectors.[11]

Thus, after October 16, 1966, female and male employees worked as inspectors on both the day and night shifts.

Male and female inspectors working the same shift have been and are paid at the same base hourly rate. Moreover, under the Corning Glass Works Plan of job evaluation installed on January 20, 1969, all employees hired *after* that

---

[8] CCH State Wage and Hour Citator ¶57,849.

[9] They may also "bump" into such jobs during periods when the work force is being reduced.

[10] The parties stipulated that women filled 276 out of 395 openings on night inspection jobs between October 16, 1966 and June, 1970. Each of the 45 inspector jobs thus became available approximately 8 times during this four year period. No contention has been advanced that in filling these jobs Corning discriminated on the basis of sex.

[11] Several females just hired on March 14, 1967 immediately began inspection work on the steady night shift. In addition, some very junior male employees took steady night work. All qualified employees having greater seniority, whether male or female, could have claimed this work.

date are paid the base wage rate for their job regardless of their sex or whether they work on the day or night shifts. The Corning Plan also provides for a "red circle" rate paid to persons employed *before* January 20, 1969, when working as night inspectors. Thus, all inspectors, male or female, who were employed before the date of the Corning Plan and who work on the steady night shift receive a higher base wage rate ("red circle") than their counterparts, male or female, of comparable seniority, working on the day shifts.

II.

After finding the relevant facts, which were largely undisputed, and in any event mostly stipulated by the parties,[12] the district court held that the Secretary of Labor had not established that Corning violated the Equal Pay Act because he had "failed to sustain its burden of proof" that the male inspectors on the night shift and the female inspectors on the day shift performed their work "under similar working conditions," within the meaning of that phrase under the Equal Pay Act. The district court reasoned that "time of day worked is a working condition," and that "night work has a significant sociological, psychological and physiological impact on most workers."

Urging reversal of the district court's judgment, the Secretary contends primarily that: (1) in view of the legislative history of the Equal Pay Act and controlling judicial precedents, shift differences are not properly classified as "working conditions" under the statute's equal work standards; and (2) the work performed by men and women is "substantially" equal.

---

[12] The parties entered into more than 100 stipulations.

Needless to say, Corning disagrees with the Secretary's arguments as to "working conditions" in every respect. Moreover, the company seeks affirmance of the judgment of the district court on a number of additional, alternative grounds: (a) if shift differentials are not "working conditions," within the meaning of the Act, they represent a "factor other than sex" upon which wage differentials may legally be based; (b) even assuming a prior violation of the equal pay provisions, Corning achieved compliance with the Act by opening all inspection jobs to both sexes in October, 1966; and (c) its allegedly unlawful conduct occurred prior to the period of the statute of limitations and cannot make illegal action within the period of the statute that is otherwise legal.

III.

Initially, the Court must determine whether the day and night inspection jobs constitute "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Upon this issue the Secretary carries the burden of proof,[13] and in determining whether the district court erred in concluding that such burden was not met, we must keep in mind that the Equal Pay Act does not contemplate that the Secretary of Labor and the courts will engage in job evaluation for the purpose of deciding what is a proper wage differential for unequal work.[14]

---

[13] *E.g.* Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973); Schultz v. American Can Co., 424 F.2d 356, 360 (8th Cir. 1970).

[14] *See* 109 Cong. Rec. 9197-98, 9209 (1965). Indeed, in view of the exceptions to the Act, it is clear that "Congress thus intended to allow [certain] wage differentials even though the contrasted employers (*sic*) were performing equal work." Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 594 (3d Cir. 1973).

Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions, the employer, in order to prevail on the merits, must demonstrate that the wage differential is made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."[15]

The basic issue over which the parties have waged their legal battle is whether time of day worked may properly be classified as a "working condition" within the meaning of the Act. Here, the district court held that steady night work is not performed under "working conditions" similar to day work. However, the Second Circuit recently concluded in Hodgson v. Corning Glass Works,[16] a case remarkably similar to the present one, that, in view of the legislative history of the Act, time of day worked may be used by an employer to justify claimed wage discrimination only as "a differential based on any other factor other than sex," but does not constitute a "working condition" so as to make the Act altogether inapplicable.

Writing for the court in *Hodgson*, Chief Judge Friendly, in concluding that a night shift is not a "working condition," relied in no small part[17] upon the following statement from the Committee Report:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of

[15] 29 U.S.C. § 201(d)(1).

[16] 474 F.2d 226 (2d Cir. 1973).

[17] *Id.* at 232.

> this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded. . . ."[18]

In quoting this statement, the Second Circuit opinion interlineated the words "differentials based on any other factor other than sex" in brackets after the words the "broad general exclusion" in the next to last sentence in the quoted paragraph, thus revealing its belief that a "factor other than sex" is the "broad general exclusion" referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word "Thus," should therefore be construed as listing only examples of a "factor other than sex."

The specific examples that the Committee Report, in the last sentence, states would be excluded are "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability. . . ."[20] *As a group,* these examples cannot be interpreted as "factor[s] other than sex" for the simple reason that

---

[18] 109 Cong. Rec. 9210 (1963), U. S. Code Cong. & Admin. News, p. 689.

[19] 474 F.2d at 232: "'As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has been also included.'"

[20] 109 Cong. Rec. 9210 (1963).

some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, "lifting or moving heavy objects" is, beyond dispute, an example of "effort," and "experience, training, or ability" are examples of "skill." And "effort" and "skill," along with "working conditions" and "responsibility" are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as "factor[s] other than sex"[21] to be considered as matters of defense.

Of course, our interpretation of the Committee Report —that the examples set forth are not *all* "factor[s] other than sex"—does not by itself suggest the converse—that they are *all* examples of "skill, effort, and responsibility, and . . . working conditions." Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (i.e., effort, skill, responsibility, and working conditions) or solely from one of its defenses ("factor[s] other than sex"), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of day worked is a "working condition" or a "factor other than sex."

The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

> "Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be con-

[21] 29 U.S.C. § 206(d)(1).

> sidered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" (Emphasis supplied)[22]

Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an example and guideline as to the intent of Congress. Whatever may be the merits of minimizing the views of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic conflict between the Report and Congressman Goodell's statements. A comparison of the two demonstrates this:

---

[22] 109 Cong. Rec. 9209 (1963).

[23] 474 F.2d at 232.

[24] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1967), involving situations of *conflict* between Committee Reports and statements of legislators. *Cf.* American Airlines, Inc. v. C.A.B., 365 F.2d 939, 949 (D.C. Cir. 1966).

Committee Report:	Congressman Goodell:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . ."	"Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor." (emphasis supplied)
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . ." (emphasis supplied)
"Thus, among other things . . . differences based on experience, training or ability would also be excluded."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill. . . ." (emphasis supplied)

Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explanation would not appear inappropriate. Indeed, a sponsor's views are entitled to great weight in any event.[25] As this Court stated in Gartner v. Soloner:[26]

> "In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep.

[25] *See, e.g.*, National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394 (1951); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 595 (3d Cir. 1973).

[26] 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

> Elliott should be looked to as representing the true spirit of Section 102."

We conclude, then, that time of day worked is a "working condition" within the meaning of the Equal Pay Act and not merely a "factor other than sex" to be used by an employer as a matter of defense.[27]

Therefore, in the circumstances of this case, the statute is inapplicable. Because of this conclusion, we need not and do not decide Corning's other contentions, urged to support affirmance of the district court's judgment.[28]

IV.

Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. Congress was careful not to make the equal pay provisions a "Bali Hai," inviting either the Secretary of Labor or the courts to substitute their judgment for that of employers or to judge the merits of job systems. Rather, our task is merely to determine whether an employer has discrimi-

---

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a "factor other than sex" and not a "working condition," 29 C.F.R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it.

[28] For example, we need not address attention to Corning's assertion that the actual work performed by night inspectors and day inspectors is essentially unequal in terms of skill, effort, and responsibility, *see* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), since, as we hold, the night inspectors and the day inspectors were not working "under similar working conditions."

nated on the basis of sex by paying different wages "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ."

In terms of congressional intent, we cannot say that the district court erred in concluding that "a given job performed [by some at night and others during the day] is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.'"

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	10
Conclusion	15
Appendix A	1a
Appendix B	17a
Appendix C	18a

CITATIONS

Cases:

Hodgson v. *Corning Glass Works*, 474 F. 2d 226, pending on petition for a writ of certiorari, No. 73-29 ..... 10, 11, 12

Hodgson v. *Miller Brewing Company*, 457 F. 2d 221 10

Hodgson v. *San Diego Unified School District*, 71 CCH Lab. Cas. ¶ 32,920 (S.D. Calif., 1973), pending on appeal, No. 72-2805 (C.A. 9) 10

Shultz v. *American Can Company*, 424 F. 2d 356 10

Statutes:

Fair Labor Standards Act, 52 Stat. 1062, as amended, 77 Stat. 56, 29 U.S.C. 201 *et seq.*:

Statutes—Continued Page

Section 6(d)(1), 29 U.S.C. 206(d)(1) 2-3, 4
Section 6(d)(3), 29 U.S.C. 206(d)(3) 3

Miscellaneous:

109 Cong. Rec. 9209 14
109 Cong. Rec. 9210 14
29 C.F.R. 800.145 ..... 4, 11
H.R. 3861, 88th Cong., 1st Sess. 13
Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 14
Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S. 910, 88th Cong., 1st Sess. 14

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

CORNING GLASS WORKS, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 480 F.2d 1254. The opinion and supplemental findings of the district court (App. C, *infra*, pp. 18a-39a) are reported at 341 F.Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1973 (App. B, *infra*, p. 17a). On Sep-

tember 17, 1973, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1), prohibit an employer from paying a higher base wage to male night shift inspectors performing the same work as female inspectors on the day shift, where the higher base wage (1) was adopted to induce men to perform work traditionally performed by women and (2) is paid in addition to a night shift bonus which is paid to all employees, regardless of sex, for night work.

STATUTES INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act, 52 Stat. 1062, as amended, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed un-

der similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 6(d)(3) of the Fair Labor Standards Act, as amended, 29 U.S.C. 206(d)(3), provides:

> For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Middle District of Pennsylvania to enjoin Corning Glass Works ("Corning") from paying lower wages to women inspectors employed at its plant in Wellsboro, Pennsylvania, than it paid to men performing the same work, excluding wage differences attributable to contractual shift differentials.[1] The Secretary

[1] The Department of Labor has never challenged the lawfulness of "shift differentials," or differences in wages based on time of day worked. Concededly it may be appropriate to

alleged that the wage differential discriminated against women inspectors on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act (29 U.S.C. 206(d)(1)), and sought to restrain Corning from further violations of the Act and from withholding back pay due to women inspectors because of past violations.

Until October 16, 1966, except during World War II, only women worked as inspectors during the day shifts and only men did such work at night (J.A. 18-19).[2] When the practice of employing men inspectors at night was instituted, Corning did not pay shift differentials (J.A. 19) and the men in all other job classifications were paid the same base wages, regardless of shift (Supp. Fdgs. 15 and 16, App. C, *infra*, pp. 29a-30a). Nonetheless, Corning historically paid its men inspectors a higher base wage than it paid to women inspectors. When Corning adopted a plant-wide shift differential paid to all employees working at night, that differential was added to the higher base wage paid to men inspectors (J.A. 21).

Corning denied that its concededly unequal wage rates were subject to the equal pay provisions of the Fair Labor Standards Act: specifically, Corning denied that otherwise identical work performed at night

---

pay night shift workers more than day shift workers. See 29 C.F.R. 800.145. Our contention is, instead, that the Equal Pay Act prohibits an employer from paying higher wages to men working night shift *solely because* they are men.

[2] "J.A." references are to the joint appendix in the court of appeals, a copy of which has been lodged with the Clerk.

and during the day was work "performed under similar working conditions" within the meaning of the Act.[3]

1. The practice of compensating men inspectors at higher base rates began in 1925, when Corning started automating its Wellsboro plant. Prior to 1925, the only inspectors employed at the Wellsboro plant were women who worked on both the day and afternoon shifts (J.A. 18-19). When automation brought around-the-clock production, Corning employed men as inspectors on the night shift because Pennsylvania law prohibited the employment of women after midnight. The men were paid higher base rates, not because they worked at night,[4] but because they were men and, as such, commanded higher rates (J.A. 19-20).

Corning did not pay shift differentials as such until it was organized by a union in 1944 and required to do

---

[3] Corning also claimed that the inspector packers, positioner inspectors and frost light inspectors on the night shift were required to exert greater effort than were their counterparts on the day and afternoon shifts, and that the quality inspectors on the night shift, although exerting equal effort, were required to exercise greater responsibility than their counterparts on the day and afternoon shifts. It further claimed that even if the work performed in each of the four inspector classifications was found to be equal, the violations had been corrected by its October 1966 agreement with the union to open job vacancies in the inspector classifications to all employees regardless of sex. The courts below did not rule on these contentions, although the district court did enter supplemental findings of fact relating to them.

[4] The base rates established for all-male jobs were the same on all three shifts (Supp. Fdgs. 15 and 16, App. C, *infra*, pp. 29a-30a).

so by a collective bargaining agreement.[5] The first contract made no changes in Corning's existing base rate schedules (including those established for men and women inspectors), but it did require Corning to develop an equitable wage rate plan for all job classifications (J.A. 373-374). Pursuant to this provision, Corning adopted a job classification system developed by its consultants, Stevenson, Jordan and Harrison, the "SJ&H plan." The SJ&H plan described and evaluated the inspector jobs on the basis of "General schooling," "training period," "manual skill," "versatility," "job knowledge," "responsibility," and "working conditions" (Fdgs. 15 and 16, App. C, *infra*, pp. 20a-21a; J.A. 1157). The SJ&H plan defined "working conditions" as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machine chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the[ir] duties" (Exh. J to Pltf's Exh. 1, pp. 10, 28). The district court found that "[u]nder the SJ&H plan, the ratings of [each] factor differed for each inspector job but the ratings of surroundings and hazards [*i.e.*, working conditions] were the same for the day and night shifts for each

---

[5] The 1944 union contract established shift differentials of 3 cents per hour for employees on the nonrotating afternoon shift and 5 cents per hour for those on the nonrotating night shift (J.A. 21, 22). These differentials, the validity of which is not challenged by petitioner, have since increased to 10 and 16 cents per hour (J.A. 22).

job" (Fdg. 17, App. C, *infra*, p. 21a, J.A. 1157; Stip. P-50, J.A. 67).

However, the SJ&H plan perpetuated the practice of paying lower wages to women, since it provided that the men's wage rates were to be established by multiplying the plant's rating factor for a job by the prevailing rate for unskilled male labor, whereas women's wages were calculated by multiplying this same factor by the lower prevailing rate for unskilled female labor (Supp. Fdg. 42, App. C, *infra*, p. 35a, Exh. J to Pltf's Exh. 1, p. 13).[6]

These differentials between men and women were maintained, not only in each succeeding union contract, but also when Corning re-evaluated the jobs under the Corning Glass Works (CGW) plan in 1964 (Stip. P-55 and D-41, J.A. 63-64). The CGW plan, like the SJ&H plan, defined "working conditions" as a job's physical surroundings and hazards (J.A. 844-845); it did not include the time of day worked (Stip. D-40, J.A. 63; also J.A. 381). Moreover, the CGW plan adopted the same job descriptions and evaluations of skill, effort, responsibility and the like for the inspection jobs on each shift (Stip. D-41, J.A. 63).

The greater burden of night work was compensated by a shift differential, and not by varying the job evaluation of "working conditions." This was stated

---

[6] Under this formula, the maximum rates for inspection work by men were $1.05, $1.155 and $1.255 whereas the maximum rates for women were 91.5 and 97.5 cents and $1.035 (J.A. 1067, 1068).

by Corning's expert witness, Dr. Paul Lehoczky (J.A. 845):

> Q. How do[es Corning] compensate employees for working at different times of day?
>
> A. They compensate them by a shift differential * * *.

Dr. Lehoczky added that differences of time of day worked were considered a "wage condition," not a "working condition" (J.A. 847).

Effective January 18, 1965, Corning merged its separate male and female rate schedules. This merger, however, preserved the differential in base rates between men and women inspectors because women were placed into a lower labor grade on the revised rate schedule with a lower rate of pay (Supp. Fdgs. 43 and 44, App. C, *infra*, pp. 35a-36a).

On October 16, 1966, Corning merged its separate seniority lists for males and females, and, since that time, women have been permitted to exercise their seniority to obtain jobs on the night shift (Supp. Fdg. 40, Fdg. 10, App. C, *infra*, pp. 35a and 20a). However, women inspectors were not allowed to displace less senior men inspectors employed on the night shift. Instead, women had to fill out transfer requests, wait for vacancies to occur, and then remain on that shift for a period of months to acquire sufficient tenure to avoid dismissal in the event of a reduction in force (Supp. Fdg. 47, App. C, *infra*, p. 36a). Despite these obstacles, some of the women inspectors transferred to the night shift; however, those who remained on the morning and afternoon shift continued

to receive the lower rates. Also, "a few male inspectors" took jobs on day and afternoon jobs, but "with [a] concomitant reduced base hourly rate" (Supp. Fdg. 58, App. C, *infra*, p. 38a).

The final change instituted by Corning occurred on January 20, 1969, when it abolished its separate base wage rates for day and night shift inspectors and established the same wage rate for all three shifts (J.A. 49-50). At the same time, however, through the device of retroactive wage increases, Corning raised the rates for its night shift inspectors to higher levels than those established under its new job evaluation plan and "red circled" these rates, thereby continuing the differentials that had previously existed between day and night inspectors (J.A. 47-51).[7]

2. The district court found that "except for the time of day worked, [the inspectors'] working conditions were the same," but concluded that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical" (App. C, *infra*, p. 24a; J.A. 1160). The court therefore dismissed the Secretary's action. The court of appeals affirmed, based on its reading of the Equal Pay Act's legislative history. The court below acknowledged that its construction of the Act is directly contrary to that of the Second

---

[7] Under this arrangement, any employee with plant seniority as of or prior to January 20, 1969, who holds, or who subsequently takes, a job as inspector on the night shift receives the "red circle" rate (Supp. Fdg. 54, App. C, *infra*, p. 37a).

Circuit in the "remarkably similar" case of *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, pending on petition for a writ of certiorari, No. 73-29 (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

The opinion of the Third Circuit in this case rejects the central conclusion of the Second Circuit on the same issue between the same parties. The conflict could not be more direct. The conflict not only creates uncertainty for the parties (there is yet another equal pay case on the same issue pending against Corning in Rhode Island, Civ. No. 4036, D.R.I) and disparate treatment of similarly situated Corning employees in different states, but also creates uncertainty for the numerous industries which, like Corning, operate on a 24-hour basis and, until recently, have restricted their night shift to men. See, *e.g.*, *Shultz* v. *American Can Company*, 424 F.2d 356 (C.A. 8); *Hodgson* v. *Miller Brewing Company*, 457 F.2d 221 (C.A. 7); *Hodgson* v. *San Diego Unified School District*, 71 CCH Lab. Cas. ¶ 32,920 (S.D. Calif., 1973), pending on appeal, No. 72-2805 (C.A. 9). Review by this Court is therefore warranted.

1. The Secretary does not question Corning's right to pay higher wages to its employees who work undesirable night hours. The Secretary's Equal Pay Act regulations explicitly recognize the legitimacy of Judge Friendly's observation during the argument of the Second Circuit case that, "You'd have to pay me twice as much to work at night." See 29 C.F.R. 800.145. What the Secretary does challenge is Corning's right to maintain a wage differential which, although paid to certain employees working on the night shift, is unrelated to that fact, having its origin in sex, and is being paid *in addition* to the shift differential, which is paid to all employees, regardless of sex, working undesirable night hours.

Neither the Second nor the Third Circuit questioned the propriety of maintaining a wage differential based upon the time of day worked. The two courts differed, however, on whether "time of day worked" is a "working condition" or a "factor other than sex" justifying a wage difference. We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (474 F. 2d at 232) demonstrates that the statutory term "working condition" was intended to encompass physical surroundings and hazards, not time of day worked (see point 2, *infra*, p. 13).

However, we believe the Act applies in the circumstances of this case under either reading of these statutory terms. Judge Friendly's opinion for the Second Circuit goes to the heart of the matter in stating (474 F. 2d at 233):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women daytime inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. * * *

A higher wage paid to men to do what they called "female work"—which the Act forbids—does not become lawful simply because the men work at night. Of course workers may be paid more for night work—and, since 1944, Corning has maintained a shift differential to do just that. But the wage differential the Secretary challenges has nothing to do with the fact that the work is at night: it began as an increment to men to do "female work" and was simply added on to shift differentials when they were instituted in 1944. It has been carried forward in each collective bargaining agreement and exists today as the "red circle" rates for night shift workers employed before January 20, 1969.

The district court found that "except for the time of day worked, [the inspectors'] working conditions were the same" (Pet. App. C, *infra*, p. 24a). But time of day worked is compensated for by shift differentials which are not challenged by the Secretary. Thus, regardless of whether "time of day worked" is a "working condition" or a "factor other than sex," the wage differential challenged here is not the one based on time of day worked (*i.e.*, the shift differential), but another separate and additional differential having its origins in considerations of sex.

This is not to suggest that varying wage rates for different working conditions may be challenged whenever they embody subtle judgments based on considerations of sex. But we do contend that where jobs differ only in respect to a discrete condition or factor, such as time of day, which is separately and independently compensated by a differential geared to that condition and where the base rate of pay therefore reflects no difference in working conditions (however defined), the jobs are equal for purposes of the Equal Pay Act.

2. In any event, we believe the Second Circuit's conclusion, that time of day worked is a proper subject for "a differential based on any other factor other than sex," rather than a "working condition," more accurately reflects industry practice and the legislative history of the Equal Pay Act. As originally introduced, the Act's equal pay requirement would have applied to "equal work on jobs the performance of which requires equal skills" (H.R. 3861, 88th Cong., 1st Sess.). During the hearings, however, industry representatives, including Ezra G. Hester from Corning Glass Works, argued that this definition was too broad, and urged that the bill's equal work standard be restated in terms of "[t]he four factors embrac[ing] those aspects of job worth that are always considered * * * as being important * * * [for job evaluation purposes]: Effort, skill, responsibility and working conditions." "Working conditions," Mr. Hester informed the Labor Subcommittees, comprised two "subfactors": "surroundings"

and "hazards." Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 233-234, 236, 238; Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S. 910, 88th Cong., 1st Sess. 96-104.

In response to this and similar testimony, the bill was rewritten to incorporate the industrial practice of using "job classification systems" (109 Cong. Rec. 9210). This, as the Second Circuit recognized, is persuasive evidence that the drafters of the legislation intended that the "similar working conditions" language should have the same meaning as in industrial practice—as exemplified by Corning's own job evaluation plan (*supra*, p. 7; see 474 F. 2d at 232).[8]

---

[8] The remainder of the legislative history, specifically the House Committee Report and Representative Goodell's comments, are set out in both opinions below. While we believe the better interpretation of the Committee Report is that it lists "differences based on time of day worked" under the bill's "broad general exclusion" permitting "differentials based on any other factor other than sex," we concede there is some ambiguity. The remarks of Representative Goodell—who was not, as the court below supposed, the bill's sponsor—were a broad generalized analysis of the bill. His statement that "difference in shift * * * would logically fall within the working condition factor" (109 Cong. Rec. 9209) should not be given controlling weight in light of the generalized nature of his remarks, the genesis of the equal pay definition outlined above, and the manifest purposes of the Equal Pay Act.

CONCLUSION

The question presented in this petition should be resolved by the Court, particularly in light of the conflict between the Second and Third Circuits. However, we believe the same issue is adequately presented by Question No. 1 of the present respondent's Petition for a Writ of Certiorari in the Second Circuit case, No. 73-29, which is now ready for consideration by this Court. We respectfully suggest, therefore, that this Court grant certiorari in No. 73-29, limited to Question No. 1, and postpone disposition of the present petition pending its decision in No. 73-29.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

SYLVIA S. ELLISON,
HELEN W. JUDD,
Attorneys,
Department of Labor.

OCTOBER 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1590

PETER BRENNAN, Secretary of Labor,
United States Department of Labor, APPELLANT

v.

CORNING GLASS WORKS, a corporation, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 69-396)

Argued Monday, May 21, 1973
Before KALODNER, ALDISERT and ADAMS,
Circuit Judges

OPINION OF THE COURT

(Filed June 28, 1973)

ADAMS, *Circuit Judge.*

This action was commenced by the Secretary of Labor to enjoin claimed violations of the equal pay

provisions of the Fair Labor Standards Act [1] and to restrain the withholding of wages allegedly due certain female employees. The broad issue presented for the Court's judgment is whether Corning Glass Works engaged in wage discrimination violative of the Equal Pay Act [2] by paying more to *night* inspectors than to *day* inspectors at its Wellsboro, Pennsylvania plant.

The basic factual pattern involved in this case implicates the Equal Pay Act because, for reasons

---

[1] 29 U.S.C. § 201 *et seq.*

[2] The equal pay provisions were added to the Fair Labor Standards Act as an amendment to § 6(d) of the Act. Enacted by Congress in 1963 to correct certain conditions considered contrary to the country's interest, the Equal Pay Act provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

that will be fully explained, *infra*, before October 16, 1966, night inspection work was performed exclusively by males and day inspection work largely by females. Thus, the Secretary asserts, in essence, that Corning paid male night inspectors more than female day inspectors for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."[3] The district court disagreed, and the case is now here on appeal.

I.

The pay practices at the heart of this controversy developed over a period spanning more than forty-five years. Before 1925, Corning operated its Wellsboro Plant only during the day, finding it either unnecessary or undesirable to employ a night shift. All inspection work at that time was performed by women. The introduction of automated production equipment between 1925 and 1930, however, made it necessary or desirable for the first time to use night shifts.

Until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of midnight and 6:00 A.M.,[4] and thus, in order to fill inspector positions on the new steady night shift, Corning had to hire men. These night inspectors, selected from male employees within the plant, were paid for their night inspection work the individual

---

[3] 29 U.S.C. § 206(d)(1).

[4] Act of July 25, 1913, P.L. 1024.

rates they had previously been receiving. Such wages were higher than the rates paid to women engaged as inspectors on the day shift. A situation thus developed in which male inspectors worked at night, female inspectors during the day, and the male employees were paid at higher rates.[5]

This wage differential was reinforced when, in 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of Corning's Wellsboro Plant and negotiated a collective bargaining agreement providing, for the first time, a plant-wide night shift differential. Despite this new *shift* differential, serving as a premium for night work, the pre-existing *wage* difference between night shift inspectors and day shift inspectors continued in effect.[6]

In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor.[7] Under the applicable regulations, however, Corning could have employed women at night only if it would provide them transportation or if Wellsboro had public

---

[5] After installation of the Stevenson, Jordon & Harrison wage evaluation plan in 1947, for example, the resulting wage differentials between the night and day shifts amounted to a high of 19 cents an hour, in addition to the shift differential of 4 cents an hour for the afternoon shift and 10 cents an hour for the night shift. By 1966, the highest base wage differential was 22½ cents an hour.

[6] See note 5, *supra*.

[7] Act of May 21, 1947, P.L. 389, § 4.

transportation. It was not economically feasible for Corning to furnish transportation to its female employees, and public transportation was unavailable. The 1947 state regulations were later amended in July, 1965 to permit night work for those women who had regular, private transportation.[8]

Since October 16, 1966, by mutual agreement between the union and Corning, women have been permitted to exercise their seniority, on the same basis as men, to claim steady night shift jobs when vacancies occur.[9] A considerable number of female employees have availed themselves of this opportunity to take the higher-paying night shift inspection jobs.[10] In addition, several new female employees, as well as a new male employee, have been hired to work as night inspectors.[11]

---

[8] CCH State Wage and Hour Citator ¶ 57,849.

[9] They may also "bump" into such jobs during periods when the work force is being reduced.

[10] The parties stipulated that women filled 276 out of 395 openings on night inspection jobs between October 16, 1966 and June, 1970. Each of the 45 inspector jobs thus became available approximately 8 times during this four year period. No contention has been advanced that in filling these jobs Corning discriminated on the basis of sex.

[11] Several females just hired on March 14, 1967 immediately began inspection work on the steady night shift. In addition, some very junior male employees took steady night work. All qualified employees having greater seniority, whether male or female, could have claimed this work.

Thus, after October 16, 1966, female and male employees worked as inspectors on both the day and night shifts.

Male and female inspectors working the same shift have been and are paid at the same base hourly rate. Moreover, under the Corning Glass Works Plan of job evaluation installed on January 20, 1969, all employees hired *after* that date are paid the base wage rate for their job regardless of their sex or whether they work on the day or night shifts. The Corning Plan also provides for a "red circle" rate paid to persons employed *before* January 20, 1969, when working as night inspectors. Thus, all inspectors, male or female, who were employed before the date of the Corning Plan and who work on the steady night shift receive a higher base wage rate ("red circle") than their counterparts, male or female, of comparable seniority, working on the day shifts.

II.

After finding the relevant facts, which were largely undisputed, and in any event mostly stipulated by the parties,[12] the district court held that the Secretary of Labor had not established that Corning violated the Equal Pay Act because he had "failed to sustain its burden of proof that the male inspectors on the night shift and the female inspectors on the day

[12] The parties entered into more than 100 stipulations.

shift performed their work "under similar working conditions," within the meaning of that phrase under the Equal Pay Act. The district court reasoned that "time of day worked is a working condition," and that "night work has a significant sociological, psychological and physiological impact on most workers."

Urging reversal of the district court's judgment, the Secretary contends primarily that: (1) in view of the legislative history of the Equal Pay Act and controlling judicial precedents, shift differences are not properly classified as "working conditions" under the statute's equal work standards; and (2) the work performed by men and women is "substantially" equal.

Needless to say, Corning disagrees with the Secretary's arguments as to "working conditions" in every respect. Moreover, the company seeks affirmance of the judgment of the district court on a number of additional, alternative grounds: (a) if shift differentials are not "working conditions," within the meaning of the Act, they represent a "factor other than sex" upon which wage differentials may legally be based; (b) even assuming a prior violation of the equal pay provisions, Corning achieved compliance with the Act by opening all inspection jobs to both sexes in October, 1966; and (c) its allegedly unlawful conduct occurred prior to the period of the statute of limitations and cannot make illegal action within the period of the statute that is otherwise legal.

III.

Initially, the Court must determine whether the day and night inspection jobs constitute "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Upon this issue the Secretary carries the burden of proof,[13] and in determining whether the district court erred in concluding that such burden was not met, we must keep in mind that the Equal Pay Act does not contemplate that the Secretary of Labor and the courts will engage in job evaluation for the purpose of deciding what is a proper wage differential for unequal work.[14]

Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions, the employer, in order to prevail on the merits, must demonstrate that the wage differential is made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of produc-

---

[13] *E.g.*, Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973); Schultz v. American Can Co., 424 F.2d 356, 360 (8th Cir. 1970).

[14] *See* 109 Cong. Rec. 9197-98, 9209 (1965). Indeed, in view of the exceptions to the Act, it is clear that "Congress thus intended to allow [certain] wage differentials even though the contrasted employers (sic) were performing equal work." Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 594 (3d Cir. 1973).

tion; or (iv) a differential based on any other factor other than sex. . . ." [15]

The basic issue over which the parties have waged their legal battle is whether time of day worked may properly be classified as a "working condition" within the meaning of the Act. Here, the district court held that steady night work is not performed under "working conditions" similar to day work. However, the Second Circuit recently concluded in Hodgson v. Corning Glass Works,[16] a case remarkably similar to the present one, that, in view of the legislative history of the Act, time of day worked may be used by an employer to justify claimed wage discrimination only as "a differential based on any other factor other than sex," but does not constitute a "working condition" so as to make the Act altogether inapplicable.

Writing for the court in *Hodgson*, Chief Judge Friendly, in concluding that a night shift is not a "working condition," relied in no small part [17] upon the following statement from the Commitee Report:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the

---

[15] 29 U.S.C. § 201(d)(1).

[16] 474 F.2d 226 (2d Cir. 1973).

[17] *Id.* at 232.

> broad general exclusion has been also included. Thus, among other things, shift differentials [restrictions on or differences] based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded. . . ." [18]

In quoting this statement, the Second Circuit opinion interlineated the words "differentials based on any other factor other than sex" in brackets after the words the "broad general exclusion" in the next to last sentence in the quoted paragraph, thus revealing its belief that a "factor other than sex" is the "broad general exclusion" referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word "Thus," should therefore be construed as listing only examples of a "factor other than sex."

The specific examples that the Committee Report, in the last sentence, states would be excluded are "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting

---

[18] 109 Cong. Rec. 9210 (1963), U.S. Code Cong. & Admin. News, p. 689.

[19] 474 F.2d at 232: " 'As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has been also included.' "

or moving heavy objects, differences based on experience, training, or ability. . . ." [20] *As a group*, these examples cannot be interpreted as "factor[s] other than sex" for the simple reason that some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, "lifting or moving heavy objects" is, beyond dispute, an example of "effort," and "experence, training, or ability" are examples of "skill." And "effort" and "skill," along with "working conditions" and "responsibility" are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as "factor[s] other than sex" [21] to be considered as matters of defense.

Of course, our interpretation of the Committee Report—that the examples set forth are not *all* "factor[s] other than sex"—does not by itself suggest the converse—that they are *all* examples of "skill, effort, and responsibility, and . . . working conditions." Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (i.e., effort, skill, responsibility, and working conditions) or solely from one of its defenses (factor[s] other than sex"), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of

---

[20] 109 Cong. Rec. 9210 (1963).

[21] 29 U.S.C. § 206(d)(1).

day worked is a "working condition" or a "factor other than sex."

The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

> "Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" (Emphasis supplied)[22]

Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an example and guideline as to the intent

---

[22] 109 Cong. Rec. 9209 (1963).

[23] 474 F.2d at 232.

of Congress. Whatever may be the merits of minimizing the views of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic conflict between the Report and Congressman Goodell's statements. A comparison of the two demonstrates this:

Committee Report:	Congressman Goodell:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . ."	"Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor." (emphasis supplied)
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . ." (emphasis supplied)
"Thus, among other things . . . differences based on experience, training or ability would also be excluded."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill. . . ." (emphasis supplied)

Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explana-

---

[24] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1967), involving situations of *conflict* between Committee reports and statements of legislators. *Cf.* American Airlines, Inc. v. C.A.B., 365 F.2d 939, 949 (D.C. Cir. 1966).

tion would not appear inappropriate. Indeed, a sponsor's views are entitled to great weight in any event.[26] As this Court stated in Gartner v. Soloner:[28]

> "In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102."

We conclude, then, that time of day worked is a "working condition" within the meaning of the Equal Pay Act and not merely a "factor other than sex" to be used by an employer as a matter of defense.[27]

Therefore, in the circumstances of this case, the statute is inapplicable. Because of this conclusion, we need not and do not decide Corning's other conten-

---

[26] *See, e.g.*, National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394 (1951); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 595 (3d Cir. 1973).

[28] 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a "factor other than sex" and not a "working condition," 29 C.F.R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it.

tions urged to support affirmance of the district court's judgment.[28]

IV.

Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. Congress was careful not to make the equal pay provisions a "Bali Hai," inviting either the Secretary of Labor or the courts to substitute their judgment for that of employers or to judge the merits of job systems. Rather, our task is merely to determine whether an employer has discriminated on the basis of sex by paying different wages "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ."

In terms of congressional intent, we cannot say that the district court erred in concluding that "a given job performed [by some at night and others during the day] is not performed under similar work-

---

[28] For example, we need not address attention to Corning's assertion that the actual work performed by night inspectors and day inspectors is essentially unequal in terms of skill, effort, and responsibility, *see* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), since, as we hold, the night inspectors and the day inspectors were not working "under similar working conditions."

ing conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.' "

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1590

PETER BRENNAN, Secretary of Labor,
United States Department of Labor, APPELLANT

vs.

CORNING GLASS WORKS, A Corporation

(D. C. Civil No. 69-396)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: KALODNER, ALDISERT and ADAMS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 31, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas S. Quinn
Clerk

June 28, 1973

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

OPINION

MUIR, District Judge.

I. INTRODUCTION.

This suit was commenced by the Secretary of Labor on October 2, 1969, pursuant to 29 U.S.C. Section 201, *et seq.*, the Fair Labor Standards Act ("Equal Pay Act"). Plaintiff seeks to enjoin Defendant's alleged practice of wage discrimination based on sex and to obtain restitution of unpaid wages allegedly due certain female employees of Defendant.

II. FINDINGS OF FACT.

1. Corning Glass Works ("Corning") is a New York Corporation having its principal offices in Corning, New York. (Stip. of Fact 2)

2. The Wellsboro plant of Corning Glass Works is the only plant involved in this case. (Stip. of Fact 2)

3. There are four separate jobs involved in this litigation: Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector. (Stip. of Fact 6)

4. Prior to October 16, 1966, except during World War II, only female employees worked in these inspector positions on the day shifts at the Wellsboro plant. (Stip. of Fact 8)

5. Prior to October 16, 1966, except during World War II, only male employees worked in these inspector positions on the steady night shift in the Wellsboro plant. (Stip. of Fact 9)

6. In 1947, the differential in base hourly rates between the jobs of Inspector-Packer and Inspector-Packer Nights was 19 cents an hour, the differential in base hourly rates between the jobs of Frost Light Inspector and Frost Light Inspector Nights was 18 cents an hour, and the differential in base hourly rates between the jobs of Positioner-Inspector and Positioner-Inspector Nights was 19 cents an hour. (Stip. of Facts 36, 42, 45e)

7. On October 16, 1966, these respective differentials were 20 cents an hour, 16 cents an hour, and 20 cents an hour. (Stip. of Facts 37, 43, 45f)

8. The differential in base hourly rates between the jobs of Quality Inspector and Quality Inspector Nights has increased from 20 cents an hour in 1949 to 22.5 cents an hour on October 16, 1966. (Stip. of Facts 48, 49)

9. These differentials in base rate of pay were in addition to the plant-wide shift differential which has

increased from 6 cents an hour in 1947 to 12 cents an hour in 1966 for steady night work. (Stip. of Facts 21-25)

10. Since October 16, 1966, by mutual agreement between the employees' certified bargaining agent and the Company, women have been permitted to exercise their seniority, on the same basis as male employees, to claim jobs on the steady night shift when vacancies occur and to bump into such jobs during periods when the work force is being reduced. (Stip. of Facts 19, 30, 38, 44, 45a, 79, 85-88, 118, 119)

11. Male and female inspectors who work on the steady night shift inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 37, 72, 74, 89, 104)

12. Male and female inspectors who work on the day shifts on the inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 73, 90)

13. A night shift worker is out of phase with community life and is usually out of phase with family life. (3 N.T. 199-200)

14. Night work, both steady and rotating, interferes with the worker's physiological (circadian) rhythms. (3 N.T. 200)

15. The first job evaluation plan at Corning's Wellsboro plant was effective from October 20, 1947, to January 18, 1965, and was called the Stevenson, Jordan and Harrison Plan. It is referred to as the SJ&H Plan. (Stip. of Fact to which Defendant Either

Makes Objection or Withdraws a Prior Objection, P-39 at page 19)

16. The SJ&H Plan measured jobs by weighing the following factors: schooling, training, skill, versatility, knowledge, responsibility, surroundings, and hazards. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

17. Under the SJ&H Plan, the ratings of these factors differed for each inspector job but the ratings of the surroundings and hazards factors were the same for the day and night shifts for each job. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

III. Discussion.

Until October 16, 1966, except during World War II, only women worked as Frost Light Inspectors, Positioner-Inspectors, Inspector-Packers and Quality Inspectors on the day shift at the Wellsboro, Pennsylvania plant of Defendant Corning Glass Works, and only men were permitted to work on the night shift.[1] Plaintiff contends that because the male inspectors

---

[1] Both parties agree that Plaintiff is barred from recovery for any possible violations prior to October, 1966, by the applicable statute of limitations. However, Plaintiff's claim that Defendant has violated 29 U.S.C. Section 206(d)(1) since that time is based on residual effects of the alleged prior discrimination. Accordingly, Plaintiff's case must fail if discrimination prior to October, 1966 is not proven.

on the night shift received a higher hourly base rate of pay than the female inspectors on the day shift, in addition to a plant-wide shift differential, Defendant violated 29 U.S.C. Section 206(d)(1) which provides:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In my view, Plaintiff has failed to sustain its burden of proof that the male and female inspectors performed their work "under similar working conditions." Male inspectors worked on the night shift; female inspectors on the day. Plaintiff contends that the time of day worked is not a "working condition"

within the meaning of the statute. Plaintiff relies in part on testimony by Defendant's expert in the field of job evaluation that time of day worked is considered a wage condition, not a working condition. (3 N.T. 207, 211-212) Plaintiff also relies on the fact that the criteria evaluated under the job evaluation plans used by Defendant did not include time of day worked, and on selected legislative history. Defendant, on the other hand, points to Murphy v. Miller Brewing Company, 307 F.Supp. 829, 835 (E.D. Wisc. 1969) where the Court stated that

> "(i)t is not subject to serious dispute that there is some difference in *working conditions* between the first, second, and third shifts merely because the work is performed at different times of the day." (Emphasis supplied).

In addition, Defendant too relies on legislative history to support its position. In my view, time of day worked is a working condition within the meaning of 29 U.S.C. Section 206(d)(1).[2] As Defendant's expert testified, night work has a significant sociological, psychologoical and physiological impact on most workers.[3] It is a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard. It is a

---

[2] Cf. 29 C.F.R. Sec. 800.131-132; see also Independent Oil Workers Union, Local 117, v. American Oil Co., 296 F. Supp. 650, 658 (D. Kan. 1969).

[3] See Findings of Fact 13 and 14.

condition under which most people would prefer not to work.

The question remains whether despite the difference in time of day worked, the day and night inspectors worked under working conditions which as a whole were similar. It appears that except for the time of day worked, their working conditions were the same.[4] In my view, a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not "very much alike" or "alike in substance or essentials."[5] Hence, Plaintiff has failed to prove a violation of 29 U.S.C. Section 206(d)(1).

IV. Conclusions of Law.

1. This Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiff has the burden of proving for each of the four inspector jobs involved in this case that male and female inspectors labored under similar working conditions but were not paid equal wages for equal work.

3. Work performed on the night shift is not performed under working conditions similar to work performed on the day shifts.

---

[4] See Findings of Fact 15-17.

[5] Webster's Third New International Dictionary, Unabridged, 1966.

4. Since female inspectors worked on the day shifts and male inspectors worked on the night shift, Plaintiff has not sustained its burden of proof that male and female inspectors labored under similar working conditions.

5. Plaintiff has not proven any violation of 29 U.S.C. Section 206(d)(1).

An order in accordance with this Opinion will be entered.*

/s/ Muir
United States District Judge

DATED: March 30, 1972

---

* In the event that the Court of Appeals for the Third Circuit should decide that my reasoning is erroneous, I have filed "Supplemental Findings of Fact." These are not necessary to my decision, but might be helpful to that court in reaching an opposite conclusion or might eliminate re-litigation of these issues if the case has to be re-tried.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

ORDER

Judgment is hereby entered in favor of Defendant and against Plaintiff. Plaintiff's request for an injunction enjoining alleged violations of Sections 15 (a) (1) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U.S.C. Sections 201-219, and for withholding of payment of wages allegedly due Defendant's employees under the Act, is hereby denied.

/s/ Muir
United States District Judge

DATED: March 30, 1972

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

SUPPLEMENTAL FINDINGS OF FACT

A. Historical Background

1. Plaintiff claims a violation of the Equal Pay Act only with respect to employees who were hired prior to January 20, 1969. No violation is claimed at this time with respect to employees hired subsequent to January 20, 1969. (Stip. of Fact 121)

2. The steady night inspection jobs were created between 1925 and 1930 because of the introduction of automatic production equipment which made it necessary to inspect ware on all shifts. (Stip. of Fact 10)

3. At the time of the institution of inspection work on the night shift, and until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of 12:00 p.m. and 6:00 a.m. (Stip. of Fact 15). Thus, men had to be hired for this first night inspection shift.

4. These men were selected from male employees within the plant. (Stip. of Fact 13)

5. These men were paid the individual, personal rates they were already receiving which were higher than the rates being paid to women doing inspection work on the day shift. (Stip. of Fact 13)

6. At the time of the institution of inspection work on the night shift, Corning did not pay shift differentials. (Stip. of Fact 11)

7. During at least part of World War II, women were employed on the steady night shift as inspector-packers. (1 N.T. 203; 3 N.T. 132). There is no evidence that these women did or did not receive the same wages as the male inspector-packers working at night.

8. In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor (Act of May 21, 1947, P.L. 389, Sec. 4). The State regulations provided, among other things, that in order to be permitted to employ women at night an employer was required to furnish transportation where public transportation was not available. (Stip. of Fact 16)

9. Public transportation has not been available in Wellsboro, Pennsylvania. (Stip. of Fact 18).

10. It has not been economically feasible for Corning to furnish transportation to its female employees. (3 N.T. 195-196)

11. In 1944 the American Flint Glass Workers' Union of North America negotiated a collective bargaining agreement covering many production and maintenance employees of Corning Glass Works,

Wellsboro plant, including the inspectors who worked on the inspection jobs involved in this case. (Stip. of Fact 21)

12. This contract provided that, for the first time, all employees working a non-rotating night shift would receive a shift differential as a premium for such night work. (Stip. of Facts 22 and 23)

13. In addition to this new "shift differential" applicable to all night workers, this contract continued in effect the existing differential in base rate of pay between the employees on the steady night shift *inspection* jobs and employees on the day and afternoon shift *inspection* jobs. (Stip. of Fact 23)

14. All collective bargaining agreements entered into by Corning with the Union, between the years 1944 and 1969 continued to maintain the differential in base rate between the steady night shift inspection jobs and the day and afternoon shift inspection jobs, except for minor variations caused by the negotiation of percentage rather than flat rate increases. (Stip. of Fact 24)

15. The following jobs were performed exclusively by men on all shifts at least until October 17, 1966:

Job Code	Job Title	Group No.
1836	Industrial Truck & Equipment Opr.	7
2015	Head Mixer	10
4007	Glass Melting Furnace Operator	11
4031	Optical Reader Forehearth & Lehr Opr.	14
2181	Cng. Rbn. Mch. Operator—Class B	14
2184	Relief Attendant	10
2280	Cng. Rbn. Mch. Operator—Class A	18
1053	Hiker	3
3838	Traying Machine Operator	5
4457	Frost Operator	8
4466	Misc. Frost Operator	9
3608	Opr. Cut & Finishing Machine	9
3716	Ceramic & S & L Operator	9
5711	Sahara Operator	9
5739	Finishing Equipment Mechanic	11
0850	Ind. Truck Driver & checker	8
5728	Shift Maintenance Mechanic	13
6213	Electrician—Class A	16
6214	Electrician—Class B	12
5224	Packing Equipment Operator	7
5287	Attendant Hamper Maker & Sealer	4

(Plaintiff's Exhibit 1, p. 13)

16. With respect to these jobs, the base hourly rate has been the same on all shifts. (Plaintiff's Exhibit 1, p. 13)

17. On July 17, 1965, the State regulations were amended to provide that an employer in a manufacturing establishment could employ women between the hours of 10:00 p.m. and 6:00 a.m. if that employer arranged for adequate transportation for women workers or if prompt public transportation was available or the individual worker had regular private transportation. CCH State Wage and Hour Citator Paragraph 57,849. (Stip. of Fact 17)

18. Beginning on October 16, 1966, Corning has employed women between the hours of 12 midnight and 6:00 a.m. without providing transportation. To the best of Defendant's knowledge, these employees have regular private transportation. (Stip. of Fact 19)

19. The job of Positioner-Inspector on the night shift was eliminated on September 11, 1966, and since that time it has been performed only on the day shift. (Stip. of Fact 53; cf. Stip. of Fact 45f)

B. Differences Between the Night and Day Inspector Shifts

20. The primary duties of men and women working as Inspector-Packers, Positioner-Inspectors, Frost Light Inspectors and Quality Inspectors do not depend on which shift is being worked. (Stip. of Facts 33, 41, 45d, 46; I N.T. 7-8, 128, 143-150, 156-158, 164-193; 2 N.T. 44-65, 86-90, 93-94, 95-98, 103-108, 112-120; 3 N.T. 105-106, 134-136, 139-140, 147-154, 155-185, 189-192, 194)

21. Male inspectors on the steady night shift have performed additional duties requiring substantially greater physical effort, including heavy lifting and pushing, than jobs having the same titles on the day shifts. Only men have performed such duties, and most women could not perform many of these duties. (Stip. of Facts 34, 35, 64; 1 N.T. 170-184, 193, 198; 2 N.T. 104-109, 112-116, 197-213, 215-235; 3 N.T. 104-105, 108, 135-140, 149, 155-164, 168-172; Defendant's Exhibits D1-D85)

22. These duties are not included in the duties of these jobs on the day shifts. (2 N.T. 106-107, 215-216, 226-227).

23. On the day shifts, these duties are usually performed by "Hikers," traditionally males (Stip. of Fact 66)

24. On October 16, 1966, the maximum base rate of pay for Hikers was higher than that for night shift inspectors but lower than that for day inspectors (excluding shift differentials). (Stip. of Facts 75, 45f, 43, and 37)

25. On the day shifts, male inspectors who are called upon to perform the job of Hiker carry a multiple rate and receive the rate for the job of Hiker when performing the job of Hiker. This is also true of any male inspectors on the night shift with seniority after January 20, 1969, but not of male inspectors on the night shift hired prior to January 20, 1969, who continue to receive their inspection rate even when performing Hiker duties. (Stip. of Fact P-112 at page 24)

26. The heavy aspects of the Hiker job are lightened to the extent necessary by assigning as many men as are needed to accomplish it (2 N.T. 198-203; 3 N.T. 44, 183); by using mechanical aids (2 N.T. 198-202, 226; 3 N.T. 42, 183-184); and by rotating the men between the tiring duties and the lighter duties. (2 N.T. 223)

27. There are approximately the same number of hikers on all shifts. Three to 13 men work as Hikers

assisting inspectors on the morning and afternoon shifts. Three to 13 men work as Hikers assisting inspectors on the night shift. (Stip. of Fact 67; 3 N.T. 35)

28. The amount of time male inspectors on the steady night shift spend performing heavy manual labor varies from day to day and from person to person. (Defendant's Exhibits D1-D85)

29. Male inspectors on the night shift have spent about 25 to 30% of their time doing manual labor, heavy and light. (3 N.T. 104-108, 111, 138-139)

30. Some of the time which these male inspectors on the night shift spent performing manual labor was due to an excess of inspectors on that shift. (1 N.T. 189)

31. Although there is a wide variance from day to day and from person to person in the amount of time male inspectors on the night shift spend performing manual labor, they are all always paid at the same base hourly rate (aside from considerations of seniority) without regard to the nature and frequency of their performance of manual labor. (Stip. of Facts 37, 43, 45f)

32. A male inspector on the night shift who at times has been physically unable, due to illness, to perform the heavier aspects of Hiker work has not had his pay reduced. (2 N.T. 93-94)

33. Since October 16, 1966, when women first were permitted to apply for night shift inspector jobs, they have not had to perform manual labor at night. (2 N.T. 235)

34. During interruptions, at times, some inspectors on all shifts are assigned to the reinspection belt. The reassigned female inspectors and some of the reassigned male inspectors on all shifts engage in inspecting and repacking the ware at the belt. The inspection at this belt is primarily for broken bulbs. This is work within the Inspector-Packer job classification. (Stip. of Fact 63)

35. In addition, the female employees who have performed the inspector jobs involved in this case since October 2, 1966, generally have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than their inspector jobs.

36. Women inspectors are occasionally required to lift boxes weighing 30 pounds or more. (3 N.T. 161)

37. The only differences between the jobs of Quality Inspector and Quality Inspector Nights is that the latter generally (1) make the final decision to withhold glass or let it pass without consulting with a foreman; and (2) set their own machines in case of change-over. (1 N.T. 7-8, 3 N.T. 189-194)

C. Job Evaluation Plans

38. Under the Corning Glass Works (CGW) Plan of job evaluation, which was installed on January 20, 1969, all employees hired after January 20, 1969,

are paid the evaluated base wage rate for that job without regard to whether they work at night or during the day or whether they are men or women. (Stip. of Fact 101)

39. From October 20, 1947, to January 17, 1965, Defendant maintained separate rate schedules for males and for females. (Stip. of Fact P-60 at page 21)

40. Until October 16, 1966, Defendant maintained separate seniority lists for males and females. (Stip. of Fact 77)

41. Under the separate rate schedules for men and women, male inspectors working the steady night shift were paid a higher base hourly rate than the day and afternoon female inspectors who performed work rated at the same points by Defendant's SJ&H Plan. (T-20, 21, 60 and 61 to Plaintiff's Exhibit G)

42. The SJ&H plan provided for calculating the basic wage rates for men by converting the total values of the jobs evaluated under the plan to a rating factor and multiplying the rating factor by the unskilled labor rate of the vicinity for men. The same procedure was followed for calculating the basic wage rates for women except the unskilled labor rate of the vicinity for women was used to obtain the female rate. (Page 13 of Exhibit J to Plaintiff's exhibit 1)

43. Effective, January 18, 1965, Defendant merged the separate male and female schedules into

one revised rate schedule (Stip. of Fact P-69 at page 22)

44. This merger, however, preserved the differentials in maximum base rate between the male and female inspectors. Some of the subordinate rates were changed very slightly. (Stip. of Facts 37, 43, 45f and 49; pages 192-194 of Plaintiff's Exhibit 6)

45. Under the CGW plan, the wage rate is the same on all three shifts and for both sexes for all inspectors hired after January 20, 1969. (Stip. of Fact 102)

D. Effect of the Changes since October 16, 1966, on Wages Paid to Inspectors

46. Women must wait for vacancies in night shift jobs to occur unless they bump into such jobs in the event of a reduction in force. (Stip. of Fact 44)

47. In the event of a force reduction in a particular job, employees on the job for less than 84 days are dismissed first from that job, in order of plant-wide seniority. (Stip. of Fact P-83 at page 22)

48. Beginning October 16, 1966, a number of female employees have availed themselves of the opportunity to take the higher-paying night shift inspection jobs. (Stip. of Facts 80 and 88)

49. Several females who were first hired on March 14, 1967, immediately began work as Inspector-Packers on the steady night shift that same night. (4 N.T. 10-11)

50. A male who was hired on September 20, 1966, began work as a Frost Light Inspector on the steady night shift on June 10, 1967. (4 N.T. 12)

51. Another male, hired on May 9, 1966, began work as a Quality Inspector on the steady night shift on March 31, 1967. (4 N.T. 12)

52. All qualified employees of the Wellsboro plant who had greater seniority than the employees listed in the previous three paragraphs could have claimed the steady night shift inspection jobs on the dates those employees began work on those jobs. (4 N.T. 13-16)

53. Since 1944 every collective bargaining agreement has contained Article 15, section 2, which provides:

> "When job evaluation * * * results in wage brackets lower than prevailing rates then paid for the job it is not the intention of the company to reduce the prevailing base rates of employees currently working on such jobs." (Stipulation 108)

54. Paragraph 9 of Schedule A of the installation rules of the CGW Plan provides:

> "Any employee who as of the date of the installation of the CGW Hourly Job Evaluation Plan is an employee of the Wellsboro plant covered by the terms of the Basic Agreement and who thereafter by operation of rights under the Basic Agreement continues to hold or takes any of the jobs specified on the (night) shift shall receive the rate which he or she would have received for that work under pre-existing practices. Those jobs being:

Inspector-Packer(N)
Positioner-Inspector(N)
Frost Light Inspector(N)
Quality Inspector(N)

Persons who become employees after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs." (Stipulation 109)

55. The rates paid under paragraph 9 of Schedule A are called "red-circle" rates by Corning. (Stipulation 111)

56. Because of these "red-circle" rates, all inspectors (male and female) employed before January 20, 1969 working on the steady night shift receive a higher base wage rate than their counterparts of comparable seniority working on the day shifts. (Stip. of Facts 103, 104)

57. This "red-circle" rate will not be paid to employees hired after January 20, 1969. (Stip. of Fact. 113).

58. Since October 16, 1966, a few male inspectors have taken day and afternoon inspection jobs with concomitant reduced base hourly rate. (Stip. of Facts 117, 73, 37, 43, 45f and 49)

E. Wilfullness

59. At least since May 4, 1964, Defendant has been aware of the Equal Pay Act because on that date, one of Defendant's attorneys advised Wellsboro officials of the Act and its implications, and told them to refer

any possible violations to officials in Corning, New York. (Stip. of Fact P-6 at page 5)

60. On January 24, 1966, Corning was advised by an investigator for the Department of Labor that Defendant was in violation of the Equal Pay Act at its main plant in Corning, New York, in that female inspectors on the day shifts were being paid lower base hourly rates than their male counterparts on the night shift. The investigator stated that the Department's position was that the base hourly rates of the women should be raised to that of the men and restitution paid. (Stip. of Fact P-11 at page 6)

/s/ Muir
United States District Judge

DATED: March 30, 1972

★ U. S. GOVERNMENT PRINTING OFFICE: 1973 524376 92

AUG 2 1973

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MILTON SMITH
General Counsel

O. F. WENZLER,
Labor Relations Counsel

RICHARD BERMAN
Chamber of Commerce of the
United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE D. EHRLICH
120 South LaSalle Street
Chicago, Illinois 60603

Attorneys for the Amicus Curiae

Of Counsel:

BOROVSKY, EHRLICH &
KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
INTEREST OF THE CHAMBER	1
REASONS FOR GRANTING THE WRIT	3
I. This Court Has Never Considered The Manner By Which Compliance With The Equal Pay Provisions Of The Fair Labor Standards Act Can Be Achieved	3
II. The Court Below Erroneously Decided Substantial Issues Having A Widespread Applicability	4
A. Notwithstanding a finding of prior violative conduct, dissimilar wage rates applied nondiscriminatorily between the sexes should not result in a violation of the Act	4
B. The granting of an increased rate of pay based solely upon seniority to all employees of each sex employed in a given job should not be considered a violation of the Act even where there has been a finding of prior discriminatory practice	7
CONCLUSION	9

CITATIONS

Cases:	Page
Boy's Markets v. *Retail Clerks Union*, 398 U.S. 235 (1970)	2
H. K. Porter Co. v. *N.L.R.B.*, 397 U.S. 99 (1970)	2
Hodgson v. *Corning Glass Works*, 474 F. 2d 226	4, 8
Hodgson v. *Square D Co.*, 459 F. 2d 805 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972)	6
Los Angeles Herald Examiner v. *Kennedy*, 400 U.S. 3 (1970)	2
N.L.R.B. v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972)	2
N.L.R.B. v. *Granite State Joint Board*, 409 U.S. 213 (1972)	2
N.L.R.B. v. *International Van Lines*, 409 U.S. 48 (1972)	2
N.L.R.B. v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)	2
N.L.R.B. v. *The Boeing Company, et al.*, —— U.S. ——, 93 S. Ct. 1952 (1972)	2
Schultz v. *American Can Co.—Dixie Products*, 424 F. 2d 356	6
Sears, Roebuck and Co. v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970)	2
U.S. v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278	5
U.S. v. *Oregon*, 366 U.S. 643, 649	5

Statutes:	
Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C., Section 206 (d) (1)	3, 5
Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C., Section 201 *et seq.*	3

Miscellaneous:	
109 Cong. Record 9196	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI *

INTEREST OF THE CHAMBER

The Chamber of Commerce of the United States is a federation consisting of membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five mil-

---

* Pursuant to Rule 42(2) of the Rules of this Court, the written consents of the parties to this case have been obtained and will be lodged with the Clerk of the Court.

lion (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated in *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N.L.R.B.* v. *The Boeing Company, et al.*, —— U.S. ——, 93 S. Ct. 1952 (1972); *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. Certain of the relevant facts found by the court below provide an ideal basis for consideration of significant issues of national importance relevant to interpretation of the Act.

Prior to June 1, 1966, Corning paid employees working as night shift inspectors at a higher rate than it paid day shift inspectors, and only men worked as night shift inspectors. After June 1, 1966, although the pay rate differential was maintained, the two jobs became equally available to employees of each sex and sexual integration of the jobs was substantially obtained. Effective January 20, 1969, as a direct result of collective bargaining negotiations, the pay rate on the two jobs was equalized

at a new rate higher than the rate previously existing for either job and an additional wage rate premium, based solely upon seniority (a "red circle" rate), was granted to every person employed on or prior to the date of the Agreement, male or female, who at any time thereafter worked as a night shift inspector. Thus, in addition to the threshhold question of whether the two jobs are "equal" within the meaning of the Equal Pay Act of 1963, the questions presented are (1) whether an employer violates the Act by paying dissimilar wages in jobs being compared where the employment opportunities in those jobs are available equally to both sexes and the employer is not paying a wage rate differential in violation of the Act within each of the jobs being compared, notwithstanding a finding of prior violative conduct, and (2) whether the granting of an increased rate of pay based exclusively upon seniority, to all employees of each sex on a given job, is a violation of the Act, even if there has been a finding of prior discriminatory practice.

These issues are of practical significance to the Chamber and its members in that the imposition of liability based solely upon a past practice which is no longer operative or effective discourages voluntary compliance, is at variance with both the philosophical percepts and the literal reach of the Act, and results in unwarranted imposition upon an employer whose current practices are in accord with the mandate of the Act.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Considered The Manner By Which Compliance With The Equal Pay Provisions Of The Fair Labor Standards Act Can Be Achieved

Resolution of the question of what methods of statutory compliance are available under the equal pay provisions of the Fair Labor Standards Act is of paramount importance to employers generally. The scope of the statutory

mandate reaches nearly every employer and directly affects various aspects of the employers' cost of doing business and methods of operation as well as his relations with his employees and any unions representing those employees.

Imposition of the remedy compelled by the court below[1] necessarily disruptively affects each of these aspects of the employers' operations. Consideration by this court of both the bases of the holding below as well as the conclusion reached that the only method of statutory compliance available is equalizing the rates of pay at the higher rate is essential to provide the necessary guidelines required by the business community.

Although the court below rejected Corning's contention that its methods of operation and compensation comported with the statutory mandate, the court acknowledged that ". . . the issues are not free from doubt . . .". Only consideration by this court can finally resolve those issues, clarify that "doubt", and settle important questions of federal policy embedded in an Act of Congress.

II. The Court Below Erroneously Decided Substantial Issues Having A Widespread Applicability

A. *Notwithstanding a finding of prior violative conduct, dissimilar wage rates applied non-discriminatorily between the sexes should not result in a violation of the Act.*

The proscription of the Act attaches only to employer discrimination between employees on the basis of sex when an employer is paying wages to employees at a rate less than the rate at which such employer pays wages to employees of the opposite sex where the work on the jobs being compared is equal by virtue of requiring equal skill, effort and responsibility. (Section 6(d)(1) of the Fair

---

[1] *Hodgson* v. *Corning Glass Works*, 474 F.2d 226.

Labor Standards Act of 1938 as added by the Equal Pay Act of 1963, 77 Stat. 56 USC Section 201(d)(1)).[2] The specific statutory language thus confines violative conduct only to instances where the practice complained of is a sexually based discrimination.

Corning contended that its action in making the night-shift inspector's job available on a non-discriminatory basis to employees of both sexes on June 1, 1966 and at all times thereafter eliminated a statutory basis for the finding of a violation. This was rejected by the court below principally in reliance upon that court's reading of certain legislative history. Such reliance is misplaced when it is used to alter the clear meaning of the language specifically set forth in a statute.[3]

Even if this were not the case, the legislative history relied upon does not support the conclusion reached. That history only sought to explain the so-called "reduction proviso" of the Act which precludes an employer from reducing the wage rate of any employee to obtain com-

---

[2] The Act provides:

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; of (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." (emphasis added)

[3] *U. S.* v. *Oregon*, 366 U.S. 643, 649; *U. S.* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278.

pliance with the Act. The action instituted by Corning on June 1, 1966 did not fall within the ambit of the language relied upon by the court because that action did not operate to reduce the wages of any employee in order to comply with the provision of the Act, but rather was a successful affirmative effort to make the better paying night shift inspector job equally available on a non-discriminatory basis to employees of each sex. Moreover, the legislative history relied upon below, while confining itself to the remedial consequences of a breach of the "reduction proviso" failed to consider specific legislative history corroborative of the position asserted herein. As example, Congressman Frelinghuysen pointed out that "Nothing in this bill prohibits discrimination in pay strictly between women or strictly between men. *Discrimination that operates against both men and women is not prohibited.* The only thing prohibited is a difference in pay that is based on sex" (emphasis added). 109 Cong. Rec. 9196 (1963). Congressman Goodell, speaking to the issue directly involved here, stated, "Differences in pay between groups or categories of employees that contain both men and women within the category are not covered by this act." 109 Cong. Rec. 9196 (1963). Finally, in this regard, it is the *bona fides* of the Corning program of sexual job integration which specifically distinguishes the instant proceeding from *Schultz* v. *American Can Co.—Dixie Products*,[4] the case principally relied upon below, and other decisions to that effect.[5]

Implicitly, the courts' rejection of Corning's thesis was also based upon the assumption that a specifically eliminated, non-currently operative past practice is a sufficient basis in law upon which to predicate the finding of a present violation of the Act. Under such a construction,

---

[4] 424 F.2d 356.

[5] See, e.g., *Hodgson* v. *Square D Co.*, 459 F.2d 805 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972).

current compliance with the literal mandate of the Act could never be attained by sexual job integration if the rates of pay on the compared jobs were not also equalized. Thus, the anomolous situation arises where an employer, such as Corning, who is deemed to have violated the Act, cannot come into compliance by taking the very same action as would place an employer with no history of violation in a posture of complete compliance. If, for example, Corning had first gone into business on June 1, 1966 and had operated in exactly the same fashion which Corning here did operate from that day forward, no finding of violation would be possible because even if there were a finding that there was an unjustified discrimination between the rates of pay paid to the night shift and day shift inspectors, that discrimination could not be found to be sexually based since each job was sexually integrated. Such a wage disparity would simply not fall within the ambit of the Act's proscription.

B. ***The granting of an increased rate of pay based solely upon seniority to all employees of each sex employed in a given job should not be considered a violation of the Act even where there has been a finding of prior discriminatory practice.***

Effective January 20, 1969, and as the direct result of collective bargaining negotiations between Corning and the Union representing the employees here affected, the existing wage rate differential between day shift and night shift inspectors was abolished. A new wage rate, higher than either of the former rates, was established. Additionally, the collective bargaining agreement provided that any employee who was employed prior to that date would receive additional compensation when working as night shift inspectors. This additional compensation, or "red circle" rate, was found to contravene the provisions of the Act because, in the view of the court below, it

perpetuated prior violative conduct.[6] Essential to this conclusion is a disregard of the fact that the sole eligibility criteria necessary for the attainment of the "red circle" rate was the seniority of any employee working as a night shift inspector. The sex of any otherwise eligible employee has no impact upon whether or not such employee is paid the "red circle" rate. In the instant context, where night shift inspectors work is equally available to members of each sex and any employee in the plant, regardless of sex, is paid the "red circle" rate if such employee has the necessary seniority, neither an overt nor an insidious sexual discrimination is properly inferrable. Since "seniority" is a statutorily specified permissive basis for a wage rate differential, the effect of permitting a judicial holding predicated upon such an inference would be to eliminate this specific statutory defense in all instances where an employer at some prior time had engaged in violative conduct. Such a result is not justified either under the literal wording of the Act or any reasonable reading of the legislative history.

---

[6] 474 F.2d 226, 235.

CONCLUSION

For the reasons stated, the petition for the writ of certiorari should be granted.

Respectfully submitted,

MILTON SMITH
General Counsel

O. F. WENZLER
Labor Relations Counsel

RICHARD BERMAN
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE D. EHRLICH
120 South LaSalle Street
Chicago, Illinois 60603

Attorneys for the Amicus Curiae

Of Counsel:

BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument:	
I. Certiorari should be granted limited to Question 1	11
II. Certiorari should be denied with respect to Questions 2 and 3	14
Conclusion	17

CITATIONS

Cases:	
Griggs v. *Duke Power Company*, 401 U.S. 424	17
Hodgson v. *Miller Brewing Company*, 457 F. 2d 221	12, 15
Hodson v. *San Diego Unified School District*, 71 CCH Lab. ¶ 32,920 (S.D. Calif.), pending on appeal, No. 72-2805 (C.A. 9)	12
Hodgson v. *Square D Company*, 459 F. 2d 805, certiorari denied, 409 U.S. 967	15
Robinson v. *Lorillard Corp.*, 444 F. 2d 791, certiorari dismissed, 404 U.S. 1006	17
Shultz v. *American Can Company—Dixie Products*, 424 F. 2d 356	12, 15
Shultz v. *Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139	15
Shultz v. *Wheaton Glass Company*, 421 F. 2d 259, certiorari denied, 398 U.S. 905	16
United States v. *Bethlehem Steel Corp.*, 446 F. 2d 652	17
United States v. *Jacksonville Terminal Company*, 451 F. 2d 418, certiorari denied, 406 U.S. 906	16
Wirtz v. *Dennison Manufacturing Company*, 265 F. Supp. 787	14

525-619—73——1

Statutes:
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq*. 16, 17
Equal Pay Act of 1963, Section 2, 77 Stat. 56 15
Section 6(d)(1), 29 U.S.C. 206(d)(1) 2, 3, 15
Section 6(d)(2), 29 U.S.C. 206(d)(2) 17
Miscellaneous:
29 C.F.R. 800.145 . . . . . 3, 12
108 Cong. Rec. 14751–14752 16–17
109 Cong. Rec. 2714 16
109 Cong. Rec. 9196 16
109 Cong. Rec. 9198–9199 16
109 Cong. Rec. 9209 16
109 Cong. Rec. 9210 16

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-29

CORNING GLASS WORKS, A CORPORATION, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 24–44) is reported at 474 F. 2d 226. The opinions of the district court are reported at 319 F. Supp. 1161 (Pet. App. B, pp. 45–67) and 330 F. Supp. 46 (Pet. App. C, pp. 68–78).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1973. On April 18, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 2, 1973. The petition for a writ of certiorari was filed on June 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1), prohibit an employer from paying a higher base wage to night shift inspectors performing the same work as inspectors on the day shifts, where the higher base wage (1) was adopted to induce men to perform "female work" and (2) is paid in addition to a night shift bonus which is paid to all employees, regardless of sex, for night work.

2. Whether Corning cured any prior equal pay violations in June 1966 when, without changing the higher base wage paid to its night shift inspectors, it began to allow women to work on the night shift at the higher rates, while at the same time allowing men to work on the day shifts at the lower rates.

3. Whether Corning cured any prior equal pay violations in January 1969, when it established equal wage rates for inspectors on the day and night shifts, but at the same time raised the rates for the night shift inspectors then employed to a new higher level and "red circled" those rates, thereby continuing the differentials that had previously existed between day and night inspectors.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act, as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d)(1), are set forth in the petition at p. 3.

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Western District of New York to enjoin Corning Glass Works ("Corning") from paying lower wages to women inspectors employed at its glass works in Corning, New York, than it paid to men performing the same work, excluding wage differences attributable to contractual shift differentials.[1] The Secretary alleged that the wage differential discriminated against women inspectors on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act (29 U.S.C. 206(d)(1)), and sought to restrain Corning from further violations of the Act and from withholding back pay due to women inspectors because of past violations.

Until June 1, 1966, except during World War II, women did most of the inspection work during the day shifts and only men did such work at night (Pet. App. B, pp. 50–52). When the practice of employing men inspectors at night was instituted, Corning did not pay shift differentials (Pet. App. A, p. 27). Nonetheless Corn-

[1] The Department of Labor has never challenged the lawfulness of "shift differentials," or differences in wages based on time of day worked. Thus Corning misses the point when it suggests (Pet. 9) that our position is at odds with Judge Friendly's common sense observation that "You'd have to pay me twice as much to work at night." Concededly it may be appropriate to pay night shift workers more than day shift workers. See 29 C.F.R. 800.145. Our contention is, instead, that the Equal Pay Act prohibits an employer from paying higher wages to men working the night shift solely because they are men.

ing historicaly paid its men night-shift inspectors a higher base wage than it paid to women inspectors.[2] When Corning adopted a plant-wide shift differential paid for all employees working at night, that differential was simply added to the higher base wage paid to men inspectors on the night shift (Pet. App. B, p. 51).

Corning denied that its concededly unequal wage rates were subject to the equal pay provisions of the Fair Labor Standards Act: specifically, Corning denied that otherwise identical work performed at night and during the day was work "performed under similar working conditions" as required for the application of the Equal Pay Act. Corning also contended that its night shift inspectors exerted greater effort than did the day and afternoon inspectors. Corning finally contended that, in any event, full compliance was achieved either in June 1966 when, without equalizing the day and night inspector wage rates, it allowed employees to work on any shift as vacancies occurred, regardless of their sex, or in January 1969 when it abolished separate base wage rates for day and night inspectors, but "red circled" the higher night shift rates for all employees then on night shift.

1. The practice of compensating men inspectors at higher base rates began between 1925 and 1930 when Corning started automating its glass works at

---

[2] For example between 1967 and 1969 the higher base wage differential paid to men ranged between 17 and 20.5 cents per hour depending on the job classification involved (J.A. 264a–265a). During the period in question, the inspection classifications employed on all three shifts were ~~Inspector-Packer, Positioner-Inspector, Frost Light Inspector and Quality Inspector~~. Inspector Class B Inspector Class C and General TV inspector

Corning, New York. Prior to 1925, the inspection work had been done entirely by women who worked on both the day and afternoon shifts (Pet. App. B, p. 50). When automation brought around-the-clock production, Corning resorted to the use of men as inspectors on the night shift because New York law prohibited the employment of women between 10 p.m. and 6 a.m. (*ibid.*). Corning paid the men a higher wage, not, as it now contends (Pet. 4), to compensate them for working at night, but, as the courts below found and as its own witnesses testified, to induce the men to perform work "which they regarded as 'women's work'" and "demeaning" and, in addition, to assure the men the same wages they had received on their old jobs in the blowing room (Pet. App. A, p. 36; Pet. App. B, pp. 63–65; J.A. 64a–65a, 90a, 220a–221a, 228a).[3] Those wages were not less than 48 cents per hour, as compared to wages ranging from 24 to 28 cents per hour for the same work performed by the women during the day (Pet. App. A, p. 27). As one of Corning's witnesses candidly admitted, the men "just wouldn't work at the women's rate" (J.A. 228a, 231a).

---

[3] Petitioner's reference to its pay practices during World War II (Pet. 4) does not substantiate its claim that the higher inspector rate was to compensate the men for working at night. The fact is that the higher rate was not paid to all women who worked on the night shift, but only to those who handled their own utility work (J.A. 42a–43a; Pet. App. B, pp. 50–51). That the higher rate for the men inspectors simply reflected their greater bargaining position is further confirmed by the fact that all "male only" jobs each carried the same base rate regardless of shift (Pet. App. A, pp. 36–37; Pet. App. B, pp. 64–65; J.A. 37a–38a, 111a–112a, 227a–231a).

Corning did not pay shift differentials as such until it was organized by a union in 1944 and required to do so by a collective bargaining agreement.[4] The first contract made no changes in Corning's existing base rate schedule (including those established for men and women inspectors), but it did require Corning to develop an equitable wage rate plan for all job classifications (Pet. App. B, p. 51; J.A. 91a–92a). Pursuant to this provision Corning adopted a job classification system developed by its consultants, Stevenson, Jordan & Harrison, the "SJ&H plan." The SJ&H plan described and evaluated the inspector jobs on the basis of "General schooling," "training period," "manual skill," "versatility," "job knowledge," "responsibility," and "working conditions" (J.A. 216a). Under this evaluation, the inspector jobs on all three shifts were found to be equal in all respects, including "working conditions" (J.A. 96a–97a), which were defined by the SJ&H plan as the "surrounding conditions" (wet, heat, cold, dust, grease, noises, etc.) and "hazard conditions" (bruises, cuts, heavy lifting, fumes, slippery floors, machine chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing their duties (J.A. 145a–146a). Time of day worked was not considered a "working condition" (J.A. 146a).

---

[4] The 1944 union contract established shift differentials of 3 cents per hour for employees on the nonrotating afternoon shift and 5 cents per hour for those on the nonrotating night shift (Pet. App. B, p. 51; J.A. 91a–92a). These differentials, the validity of which we do not challenge, have since been increased to 10 and 16 cents per hour.

However, the SJ&H plan perpetuated the practice of paying lower wages to women, since it provided that men's wage rates were to be established by multiplying the plan's rating factor for a job by the prevailing rate for unskilled male labor, whereas women's wages were calculated by multiplying this factor by the lower prevailing rate for unskilled female labor (J.A. 154a–155a, 212a–216a).[5]

These differentials between men and women were maintained, not only in each succeeding union contract, but also when Corning re-evaluated the jobs under the Corning Glass Works (CGW) plan in 1963 and 1964. The CGW plan, like the SJ&H plan, defined "working conditions" as a job's physical surroundings and hazards; it did not include the time of day worked (J.A. 40a–41a, 121a–122a, 145a–146a, 154a–156a). The CGW plan found that the skill, effort, responsibility and working conditions (as so defined) were the same for inspectors on each shift (J.A. 96a–97a, 175a–186a, 199a–206a).

Following enactment of the Equal Pay Act on June 10, 1963, Corning distributed an intra-company memorandum which described the wage schedules based on the SJ&H plan as "discriminatory" (J.A. 253a). Despite this memorandum, petitioner made no changes in its wage structure other than to merge into a single wage schedule the separate "male" and "female" wage schedules which had been set up under the SJ&H

[5] Under this formula, the maximum male rates for the inspection work were 85 and 95 cents per hour whereas the maximum female rates were 69 and 77 cents per hour (J.A. 236a–237a).

plan. The single schedule, however, preserved the same differentials that had previously existed between the men and women inspectors by placing the women into a lower labor grade on the revised rate schedule with a lower rate of pay (Pet. App. A, pp. 28–29; J.A. 112a, 222a–226a).

On June 1, 1966, Corning merged its separate seniority lists for males and females, and, since that time, women have been permitted to exercise their seniority to obtain jobs on the night shift (J.A. 32a, 40a, 94a–95a). However, women inspectors were not allowed to bump less senior men inspectors employed on the higher paying night shift. Instead, the women had to fill out transfer requests and wait for vacancies (J.A. 40a). Of the 15 women who requested night shift work in 1966, only four were offered such work; in 1967, 61 women requested night work and 39 received offers; and in 1968, 52 women sought night work and 42 received offers (Pet. App. A, p. 29, n. 6; Pltf's Exh. 93, pp. 5, 10).[6] Also, as the trial court noted, some men took inspector jobs on the day and afternoon shifts at the lower base hourly wage rates which those jobs carried (Pet. App. B, p. 54).

The final change instituted by Corning occurred on January 20, 1969, when it abolished its separate base wage rates for day and night shift inspectors and established the same wage rate for all three shifts Pet. App. A, p. 41). At the same time, however, through the device of retroactive wage increases, Corning

[6] Plaintiff's Exhibit 93 was not reproduced in the joint appendix, but a xerox copy has been lodged with the Clerk.

raised the rates for its night shift inspectors to higher levels than those established under its new job evaluation plan and "red circled" these rates, thereby continuing the differentials that had previously existed between day and night inspectors (Pet. App. C, pp. 70–71, 77–78, n. 4; J.A. 266a–268a). At the time of the May 10, 1971, hearing, there were no newly hired employees on the night shift, so all inspectors on it were receiving the higher or "red circled" rate.

2. *a.* The courts below concluded that Corning violated the equal pay provisions of the Fair Labor Standards Act by paying a higher base wage to men inspectors on the night shift performing the same work as women inspectors during the day, where the higher base wage was paid in addition to a regular night shift bonus. The courts rejected Corning's contention that similar work performed at night and during the day was not within the Act's definition of equal work, because it was not work "performed under similar working conditions." The court of appeals explained that while Corning's contention "would indeed seem to be true" "[t]o those uninitiated in the language of industrial relations" (Pet. App. A, p. 32), it is clear from the "legislative history * * * that the time at which work is performed was not regarded as a 'working condition' but rather as a proper subject for 'a differential based on any other factor other than sex'" (*ibid.*). As pointed out by the court, the term "similar working conditions" was added to the Act's definition of "equal work" only after a Corning expert urged Congress to adopt the formulation used in most

job classification systems, including Corning's, which "[u]nder 'working conditions' * * * listed two factors: 'surroundings' * * * and 'hazards'" (Pet. App. A, pp. 32–33).

Both courts also ruled that the higher base rates of petitioner's men inspectors could not be justified under the "factor other than sex" exception. As the court of appeals commented, "[t]he plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called 'female work.' This is the very condition at which the Equal Pay Act was aimed" (Pet. App. A, p. 37).

b. The courts below rejected petitioner's contention that any equal pay violations on its part were cured when the night shift was opened to women. As the court of appeals explained, "Congress was quite specific * * * that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women" (Pet. App. A, pp. 39–40). "In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *" (Pet. App. A, p. 40).

c. Although the district court originally held for petitioner on Question 3, it reversed itself at a sub-

sequent hearing and ruled that petitioner's January 20, 1969, agreement with the union—which established a higher "red circle" rate for night shift inspectors hired before January 20, 1969—unlawfully "perpetuates the [prior] discrimination" (Pet. App. C, p. 74). The court of appeals agreed, pointing out that night shift inspectors hired before January 20, 1969, still "receiv[e] a *basic rate* * * * some four to twelve cents per hour higher than [the basic rate] for the day and afternoon shifts" (Pet. App. A, p. 41; emphasis added).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED LIMITED TO QUESTION 1

The principal question presented in this case is whether the Equal Pay Act prohibits Corning from paying a higher base wage to night shift inspectors performing the same work as inspectors on the day shifts, where the higher base wage (1) was adopted to induce men to perform "female work" and (2) is paid in addition to the contractual differential regularly paid for night work. We believe the court below correctly decided that Corning's wage rates were in violation of the Equal Pay Act. However, the decision below is in direct conflict with the conclusion of the Third Circuit on the same issue between the same parties.[7] The conflict creates uncertainty not only

[7] The government has filed a petition for a writ of certiorari in the Third Circuit case (*Brennan* v. *Corning Glass Works*, No. 73-695), but suggests on p. 15 of the petition that the Court postpone disposition of that petition pending its decision in the present case.

for the present parties (there is yet another equal pay case pending against Corning in Rhode Island, Civ. No. 4036, D.R.I.) but also for the numerous industries which, like Corning, operate on a 24-hour basis and, until recently, have restricted their night shift to men. See, *e.g.*, *Shultz* v. *American Can Company-Dixie Products*, 424 F. 2d 356 (C.A. 8); *Hodgson* v. *Miller Brewing Company*, 457 F. 2d 221 (C.A. 7); *Hodgson* v. *San Diego Unified School District*, 71 CCH Lab. ¶ 32,920 (S.D. Calif., 1973), pending on appeal, No. 72–2805 (C.A. 9). We therefore believe that certiorari should be granted limited to this question (Question 1).

The Secretary does not question Corning's right to pay higher wages to its employees who work undesirable night hours. The Equal Pay Act regulations explicitly recognize the legitimacy of Judge Friendly's observation during the argument on appeal that "You'd have to pay me twice as much to work at night." See 29 C.F.R. 800.145. What the Secretary does challenge is Corning's right to maintain a wage differential which, although paid to certain employees working on the night shift, is unrelated to that fact, having its origin in sex, and which is being paid *in addition* to the shift differential paid to all employees, regardless of sex, working undesirable night hours.

Neither the Second nor the Third Circuit questioned the propriety of maintaining a wage differential based upon the time of day worked. The courts differed, however, on whether "time of day worked" is a "working condition" or a "factor other than sex" justifying a wage difference. We believe that the Second Circuit's "persuasive explanation of how the bill took

shape" (Pet. App. A, pp. 32–34) demonstrates that the term "working condition" was intended to encompass physical surroundings and hazards, not time of day worked.

However, we believe the Act applies in the circumstances of this case under either reading of these statutory terms. The court below went to the heart of the matter in stating (Pet. App. A, p. 37):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women daytime inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed.

A higher wage paid to men to do what they called "female work"—which the Act forbids—does not become lawful simply because the men work at night. Of course workers may be paid more for night work—and, since 1944, Corning has maintained a shift differential to do just that. But the wage differential the Secretary challenges has nothing to do with the fact that the work is at night: it began as an increment to men to do "female work" and was simply added on to shift differentials when they were instituted in 1944. It has been carried forward in each collective bargaining agreement and exists today as the "red circle" rates for night shift workers employed before January 20, 1969.

Thus, regardless of whether "time of day worked" is a "working condition" or a "factor other than sex," the wage differential challenged here is not the one based on time of day worked (*i.e.*, the shift differential), but another separate and additional differential

having its origins in considerations of sex. As the district court observed (quoting *Wirtz* v. *Dennison Manufacturing Company*, 265 F. Supp. 787, n. 1 (D. Mass.)), "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work" (Pet. App. B, p. 62).

While we believe the courts below correctly decided this issue,[8] in light of the conflict between the Second and Third Circuits, we respectfully suggest that certiorari be granted limited to this question.

II. CERTIORARI SHOULD BE DENIED WITH RESPECT TO QUESTIONS 2 AND 3

The remaining issues raised by Corning do not merit further review by this Court.

1. Corning's principal remaining contention is that it cured any prior violations of the Act on June 1, 1966, when it began to allow women to exercise their seniority to bid for jobs on the night shift, as vacancies occurred. While we acknowledge the importance of the question, we submit that it does not warrant review by this Court, because the contention has been correctly and uniformly rejected by all the courts of appeals which have considered the issue. As the court below said (Pet. App. A, p. 40):

> We thus join every other court of appeals which has considered the issue in holding that merely

[8] Our arguments are set forth more fully on pp. 13–14 of our petition in No. 73–695.

> opening the higher paid jobs to women as vacancies arise is not sufficient to comply with the requirements of the Equal Pay Act.

See *Shultz* v. *American Can Company, supra,* 424 F. 2d 356 (C.A. 8); *Hodgson* v. *Square D Company,* 459 F. 2d 805, 808 (C.A. 6), certiorari denied, 409 U.S. 967; *Hodgson* v. *Miller Brewing Company, supra,* 457 F. 2d at 226–227; *Shultz* v. *Saxonburg Ceramics, Inc.,* 314 F. Supp. 1139, 1146 (W. D. Pa.).[9]

The Equal Pay Act was designed "to correct * * * depress[ed] wages and living standards" caused by "wage differentials based on sex * * *." Equal Pay Act, Section 2, 77 Stat. 56. The Act achieves this purpose by requiring an employer paying discriminatory wages to women to raise the women's wage rates to the same level as that for men performing equal work. This requirement is expressed in the proviso of 29 U.S.C. 206(d)(1):

> *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Corning's attempt to remedy its equal pay violations by opening the night and day shifts to all employees as vacancies occurred, not only failed "to correct * * * [the] depress[ed] wages and living standards" of the

[9] Petitioner attempts to distinguish *Square D* and *American Can* on the ground that "the women had not actually been able to work on the [newly opened male] jobs" (Pet. 18), but this was not the basis for either decision. The controlling principle in each case was that the women were entitled to the higher male rate for the work they were already performing, since it was equal to the work of the men.

women employees, but also "drag[ged] down men workers [who took daytime jobs] to the wage levels of women," contrary to the express intent of Congress (109 Cong. Rec. 2714, 9196, 9210).[10]

Finally, there is no merit in Corning's claim that the decision below conflicts with the intent of "Congress * * * to afford maximum flexibility to the collective bargaining system in adjusting rate relationships" (Pet. 18–19). While the Act does not interfere with matters which are the legitimate subject of collective bargaining, it was recognized repeatedly during the debates on the equal pay provisions that unions may seek to enter into discriminatory agreements (109 Cong. Rec. 9198–9199, 9209; 108 Cong. Rec.

---

[10] In arguing that it cured any violations by opening the higher paying jobs to women, Corning apparently confuses the purpose of the Equal Pay Act with those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which is expressly concerned with job availability. In this vein Corning incorrectly suggests (Pet. 19) that the decision below conflicts with a decision under Title VII, *United States* v. *Jacksonville Terminal Company*, 451 F. 2d 418 (C.A. 5), certiorari denied, 406 U.S. 906. But there jobs made available to blacks were not "equal" to any jobs which blacks had previously performed. Here, by contrast, the women have always performed work which was "equal" to that performed by the men and were therefore entitled to the higher rate regardless of whether they ever transferred to the night shift.

Similarly, in relying on a New York statute, repealed in 1953, prohibiting the employment of women at night Corning continues to confuse the separate requirements of Title VII and the Equal Pay Act (Pet. 19–20). Even if such a protective statute insulated an employer from any liability for excluding women from the night shift, it would not justify the payment of unequal wages for equal work. See, *e.g.*, *Shultz* v. *Wheaton Glass Company*, 421 F. 2d 259, 263, n. 5 (C.A. 3), certiorari denied, 398 U.S. 905.

14751–14752). It was for this reason that Congress enacted Section 6(d)(2), 29 U.S.C. 206(d)(2), which specifically prohibits labor organizations from causing or attempting to cause an employer to discriminate in violation of the Act. The rights to equal pay for equal work, like the rights assured by Title VII, "are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799 (C.A. 4), certiorari dismissed, 404 U.S. 1006, and cases therein cited.

2. The courts below were also correct in holding that the "red circle" rates established by petitioner's January 20, 1969, agreement with the union "perpetuate the [prior] discrimination," since they continued the wage differentials which were based on sex. This holding accords with the numerous Title VII decisions striking down practices which, although "neutral on their face, and even neutral in terms of intent, * * * operate to 'freeze' the status quo of prior discriminatory employment practices." *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 659 (C.A. 2). See *Griggs* v. *Duke Power Company*, 401 U.S. 424; *Robinson* v. *Lorillard Corp.*, *supra*, 444 F. 2d at 799.

CONCLUSION

There is a conflict in the Circuits on the issue presented by Question 1: whether the Equal Pay Act prohibits an employer from paying a higher base wage to male night shift inspectors performing the same work as female inspectors on the day shifts, where the higher

base wage (1) was adopted to induce men to perform "female work" and (2) is paid in addition to the regular shift differential for night work. Questions 2 and 3 were correctly decided by the court below and present no conflict. We therefore respectfully suggest that certiorari be granted, limited to Question 1.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
SYLVIA S. ELLISON,
HELEN W. JUDD,
Attorneys,
Department of Labor.
NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

FILE COPY

FILED

NOV 28 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

CORNING GLASS WORKS, a Corporation,
Respondent.

MEMORANDUM FOR THE RESPONDENT

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Respondent.

WALTER P. DEFOREST,
Reed Smith Shaw & McClay,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

ROBERT F. COX,
Cox, Wilcox, Owlett & Lewis,
19 Central Avenue,
Wellsboro, Pennsylvania 16901.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
1701 PARKLINE DR., PITTSBURGH, PA. 15237
412-881-7463

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Conclusion	2

CITATIONS.

STATUTES:

Equal Pay Act of 1963, 29 U. S. C. § 206(d)(1) (1963) 2

Fair Labor Standards Act of 1938, as amended, 29 U. S. C. § 201, *et seq.* (1938) 2

MISCELLANEOUS:

Petition for Writ of Certiorari in *Corning Glass Works v. James D. Hodgson,* Docket No. 73-29 (U. S. Sup. Ct., filed June 29, 1973) 2, 3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

CORNING GLASS WORKS, a Corporation,
Respondent.

MEMORANDUM FOR THE RESPONDENT

Opinions Below

The opinion of the court of appeals (Pet. App. A, pp. 1a-16a) is reported at 480 F.2d 1254. The opinion and supplemental findings of the district court are reported at 341 F.Supp. 18 (Pet. App. C, pp. 18a-39a).

Jurisdiction

The judgment of the court of appeals was entered on June 28, 1973 (Pet. App. B, p. 17a). On September 17, 1973, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 26, 1973. The Petition for a Writ of Certiorari was filed on October 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act, as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d)(1), are set forth in the Petition at pp. 2-3.

Statement

Although Respondent does not entirely agree with the statement of the case presented in the Petition for a Writ of Certiorari as it pertains to the merits of the dispute presented for review, insofar as it is relevant to the question of whether certiorari should be granted Petitioner's statement is adequate (Pet., pp. 3-10).

Conclusion

We agree with Petitioner that the question presented by Question No. 1 of Respondent's Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit in *Corning Glass Works v. James D. Hodgson*, Docket No. 73-29 (U. S. Sup. Ct., filed June 29, 1973), which is now ready for consideration by this Court, should be resolved by this Court. Should this Court grant certiorari in No. 73-29 Respondent would not oppose the granting of certiorari in the instant case. Respondent does not agree with the position of Petitioner herein that this Court's grant of certiorari in No. 73-29 should be limited to Question No. 1 of that Petition but contends,

for the reasons set forth in pp. 8-22 of that Petition, that certiorari should be granted with respect to each of the three questions presented for review in that Petition.

In the event that this Court should determine that certiorari should not be granted in No. 73-29, Respondent respectfully suggests that certiorari should not be granted in the instant case.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Attorney for Respondent.

WALTER P. DEFOREST,
Reed Smith Shaw & McClay,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219.

ROBERT F. COX,
Cox, Wilcox, Owlett & Lewis,
19 Central Avenue,
Wellsboro, Pennsylvania 16901.

FILE COPY

FILED
JAN 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR CORNING GLASS WORKS,
Petitioner in No. 73-29 and Respondent in No. 73-695

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
EDWARD N. STONER II,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Statute Involved	5
Statement	5
I. The nature of the proceedings	5
II. The historical development of the wage rates of the jobs involved in these cases	6
III. Corning's efforts to achieve equal treatment of women and men	8
IV. The decisions of the courts below on the issues presented for review	13
Summary of Argument	15
Argument	20
I. Work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.	20
A. The legislative history clearly supports the Third Circuit's interpretation of the meaning of the Act.	22
B. Authorities in medicine, sociology, labor, and management have recognized that working regularly at night has different physiological effects upon workers than day work	32
II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the union making the steady night shift inspection jobs available to women without reducing any employee's wage rate.	38

PAGE

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded. 50

Conclusion 54

Addendum A, *Hearings on H.R. 3861 and Related Bills before the Special Subcommittee on Labor of the Committee on Education and Labor*, 88th Cong., 1st Sess. (1963) A-1

Addendum B, Congressional Reports and Debates B-1

Addendum C, H.R. 3861, 88th Cong., 1st Sess. (1963) C-1

Addendum D, H.R. 5605, 88th Cong., 1st Sess. (1963) D-1

Addendum E, H.R. 6060, 88th Cong., 1st Sess. (1963) E-1

Addendum F, S. 1409, 88th Cong., 1st Sess. (1963) .. F-1

CITATIONS.

Cases:

Accurate Machine Tool, Inc., 10 LA 365 (1948) 37

Anderson v. Wilson, 289 U.S. 20 (1933) 49

Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948) 36

Dairyland Power Cooperative, 14 LA 737 (1950) 37

Espinoza v. Farah Mfg. Co., 42 U.S.L.W. 4014 (U.S. Nov. 19, 1973) 32

Firestone Tire & Rubber Co., 9 WLR 726 (1943) ..36-37

First Nat'l. Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966) 31

Frank Foundries Corp., 3 WLR 223 (1942) 37

PAGE

Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972) 46

Hodgson v. Square D Co., 459 F.2d 805 (6th Cir.), *cert. denied*, 409 U. S. 967 (1972), *aff'g* 19 Wage & Hour Cas. 752 (E.D. Ky. 1970) 46-48

Hotel Employers' Ass'n, 18 LA 174 (1952) 37

Link-Belt Speeder Corp., 2 LA 338 (1945) 37

Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951) 31

Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970) 46-48

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 31, 32

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 37

United States v. Calamaro, 354 U.S. 351 (1957) ..49, 50

United States v. Oregon, 366 U.S. 643 (1961) ..18, 41, 46

United States v. United Mine Workers, 330 U.S. 258 (1947) 30, 31

Western Union Telegraph Co., 6 WLR 133 (1943) 37

Statutes:

28 U.S.C. § 1254(1) 3

Fair Labor Standards Act of 1938, as amended, Section 17, 29 U.S.C. § 217 3

Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) ..5, 21, 40, 44

N.Y. Labor Law § 173(3)(a)(1) (McKinney, 1965) .. 9

Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws 9

Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws 6

Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws 6

Act of July 25, 1913, P. L. 1024 Pennsylvania Laws .. 6

Miscellaneous:

2 CCH Lab. L. Rep., State Laws ¶ 44,501 at 56,781 (1970) (regulations) 9

109 Cong. Rec. 2482 (House, February 18, 1963) 23

109 Cong. Rec. 7848 (House, May 6, 1963) 44

PAGE

109 CONG. REC. 8915 45
9193 23
9195 23
9196 45
9197 23
9198 48
9208 .....23, 24, 32
9209 .....23, 25, 32
9210 25
9217 23
9218 (House, May 23, 1963) 23

H.R. 3861, 88th Cong., 1st Sess. (1963) 23, 43-46

H.R. 5605, 88th Cong., 1st Sess. (1963) 23

H.R. 6060, 88th Cong., 1st Sess. (1963) 23, 44, 45

S. 1409, 88th Cong., 1st Sess. (1963) 23

H.R. REP. No. 309, 88th Cong., 1st Sess. (1963) ..23, 40, 44-46

S. REP. No. 176, 88th Cong., 1st Sess. (1963), as printed in 109 CONG. REC. 8915 (Senate, May 17, 1963) 45, 46

Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor, 88th Cong., 1st Sess. (1963) ..40, 41-43

W. P. COLQUHOUN, M. J. F. BLAKE, & R. S. EDWARDS, Medical Research Council, Applied Psychology Research Unit, Cambridge, England, *Experimental Studies of Shift-Work II: Stabilized 8-hour Shift Systems,* 11 ERGONOMICS 527 (1968) 34

S. C. Mott, *Must Night Shifts Be a Headache?,* SUPERVISORY MANAGEMENT 20 (Nov. 1968) 33

K. F. MURRELL, HUMAN PERFORMANCES IN INDUSTRY, (1965) 34

U. S. PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION, AND WELFARE, BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE (1970) 33-35

S. Wyatt & R. Marriott, *Night Work and Shift Changes,* Medical Research Council Group, Research in Industrial Psychology, 10 BRITISH JOURNAL OF INDUSTRIAL MEDICINE 164 (1953) 35, 36, 38

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695.

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR CORNING GLASS WORKS

Pursuant to an Order of this Court entered on December 17, 1973, Corning Glass Works' petition for a writ of certiorari was granted to review a judgment of the Court of

Appeals for the Second Circuit in case No. 73-29[1] and that case was consolidated with case No. 73-695[2] as to which the Secretary of Labor's petition for a writ of certiorari was granted to review a judgment of the Court of Appeals for the Third Circuit.

The Court of Appeals for the Second Circuit decided the three Questions Presented, Brief *infra* at 4, unfavorably to Corning Glass Works (hereinafter "Corning"). The Court of Appeals for the Third Circuit decided the first of the "Questions Presented" favorably to Corning and accordingly did not reach other questions in that case.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 474 F.2d 226 and is printed at App. (2d Cir.) 195. The opinions of the United States District Court for the Western District of New York are reported at 319 F.Supp. 1161 and 330 F.Supp. 46 and respectively printed at App. (2d Cir.) 145 and 180.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 480 F.2d 1254 and is printed at App. (3d Cir.) 195. The opinion and supplemental findings of the United States District Court for the Middle District of Pennsylvania are reported at 341 F.Supp. 18 and printed at App. (3d Cir.) 175.

---

[1] App. (2d Cir.) 217. The abbreviation "App. (2d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-29. The abbreviation "App. (3d Cir.)" is used herein to refer to the printed Appendix filed pursuant to Supreme Court Rule 36, regarding case No. 73-695.

[2] App. (3d Cir.) 210.

Jurisdiction

The judgment[3] of the Court of Appeals for the Second Circuit, favoring the Secretary of Labor, was entered on February 2, 1973. On April 18, 1973, Mr. Justice Marshall extended to July 2, 1973, the time for filing a petition for a writ of certiorari. Corning Glass Works' petition was filed on June 29, 1973, and was granted on December 17, 1973.[4] The jurisdiction of this Court to review the judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court for the Western District of New York existed by virtue of 29 U.S.C. § 217.

The judgment[5] of the Court of Appeals for the Third Circuit, favoring Corning Glass Works, was entered on June 28, 1973. On September 17, 1973, Mr. Justice Brennan extended to October 26, 1973, the time for filing a petition for a writ of certiorari. The Secretary of Labor's petition was filed on October 26, 1973, and was granted on December 17, 1973.[6] The jurisdiction of this Court to review the judgment of the Court of Appeals for the Third Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court for the Middle District of Pennsylvania existed by virtue of 29 U.S.C. § 217.

---

[3] App. (2d Cir.) 216.

[4] App. (2d Cir.) 217.

[5] App. (3d Cir.) 209.

[6] App. (3d Cir.) 210.

Questions Presented

I. Whether work on a steady night shift is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The Second Circuit Court of Appeals answered "yes."

The Third Circuit Court of Appeals answered "no."

II. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

The Second Circuit Court of Appeals answered "yes."

III. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

The Second Circuit Court of Appeals answered "yes."

Statute Involved

The statute involved is as follows:

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1):

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Statement

I. The nature of the proceedings

These cases arise out of actions brought by the Secretary of Labor seeking to enjoin alleged violations of the equal pay provisions of the Fair Labor Standards Act and to recover wages allegedly due employees in accordance with the provisions of Section 17 of the Act.

The sole basis for these actions is the fact that Corning Glass Works ("Corning"), at two manufacturing plants located in Corning, New York, (case No. 73-29) and at a

manufacturing plant located in Wellsboro, Pennsylvania, (case No. 73-695), has paid certain inspector job classifications more money for work on a steady night shift than for work on jobs having the same titles on day shifts.

II. The historical development of the wage rates of the jobs involved in these cases

The historical development of the wage rates of the jobs involved in each of the cases here considered has been remarkably similar.

The pay practices at the core of these disputes originated between 1925-30 when Corning introduced automatic production equipment which made it necessary for the first time to employ inspectors on a steady night shift.[7]

At that time, and for many years thereafter, the laws of both Pennsylvania and New York prohibited the employment of women between 10:00 p.m. and 6:00 a.m.[8] Thus, Corning established steady night shifts, at both its Corning, New York, and Wellsboro, Pennsylvania, plants, to work from 10:00 p.m. to 6:00 a.m., which employed only men.[9]

---

[7] App. (2d Cir.) 150, Western District of New York Finding of Fact (These Findings of Fact are hereinafter abbreviated W.D. N.Y. F.F.; they were unnumbered findings.). App. (3d Cir.) 182, Middle District of Pennsylvania Supplemental Finding of Fact No. 2 (The Supplemental Findings of Fact are hereinafter abbreviated M.D. Pa. Supp. F.F.; the Findings of Fact are hereinafter abbreviated M.D. Pa. F.F.).

[8] App. (2d Cir.) 150, W.D. N.Y. F.F.; Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws (which carried forward, without change, the prohibitions against night work by females). App. (3d Cir.) 182, M.D. Pa. Supp. F.F. No. 3; Pennsylvania Act of July 25, 1913, P.L. 1024.

[9] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 182, M.D. Pa. Supp. F.F. No. 3.

In those days Corning did not pay a formal shift differential to compensate employees for working undesirable hours and, in order to obtain men to perform inspection work on a steady night shift, Corning had to pay a higher rate than had been paid for work during the day.[10]

This practice continued until World War II when manpower shortages caused Corning to be permitted to employ women on the steady night shift inspection jobs at both the Corning, New York, and the Wellsboro, Pennsylvania, plants. The district court in the New York case found that women who performed the steady night shift jobs during World War II were paid the higher steady night shift wage rates—the same wage rate paid to men working as inspectors on that shift.[11]

In 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of the Corning, New York, and Wellsboro, Pennsylvania, plants.[12] Collective bargaining agreements were negotiated which, for the first time, made formal provisions for a steady night shift differential over and above the base wage rates paid steady night shift jobs.[13] These labor agreements did not reduce the wage rates of jobs and the pre-existing wage difference between steady night work and day work continued in effect.[14] Thus, the contracts

[10] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 183, M.D. Pa. Supp. F.F. Nos. 5-6.

[11] App. (2d Cir.) 150-51, W.D. N.Y. F.F. No one could remember how people were paid at the Wellsboro plant during World War II, thus, the record in that case is silent on this point.

[12] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 183-84, M.D. Pa. Supp. F.F. No. 11.

[13] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. No. 12.

[14] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. No. 13.

included the historical steady night shift differential which had been built into the base rate and a separately designated steady night shift premium which the union had negotiated.

After World War II Corning ceased to employ women on the steady night shift in accordance with the requirements of both New York and Pennsylvania law.[15]

Between 1944 and 1969 Corning and the union negotiated a series of contracts, covering the employees at the Corning, New York, and Wellsboro, Pennsylvania, plants, which maintained the higher wage rate for steady night shift work along with a separately designated premium for such work.[16]

III. Corning's efforts to achieve equal treatment of women and men

The pattern of the legislation which precluded women from working at night was strikingly similar in both New York and Pennsylvania.

The Pennsylvania law was amended in 1947 to permit women to work at night conditioned upon the approval of the State Department of Labor. The State regulations required that, in order to be permitted to employ women at night, an employer was required to furnish transportation where public transportation was not available.[17]

The Pennsylvania district court found that public transportation has not been available in Wellsboro, Pennsylvania, and that it has not been economically feasible for

[15] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. F.F. No. 5.

[16] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. Nos. 12-14.

[17] App. (3d Cir.) 183, M.D. Pa. Supp. F.F. No. 8.

Corning to furnish transportation to its female employees.[18]

In July of 1965, the Pennsylvania state regulations were amended to permit employers to employ women at night if the individual workers had regular private transportation.[19]

The Pennsylvania district court found that, beginning October 16, 1966, Corning employed women on the steady night shift jobs, on an equal basis with men, and that both men and women who worked the steady night shift have received the same wage rates.[20]

New York state law was amended in 1953 to provide, for the first time, that women over 21 years of age could work after midnight where the State Industrial Commissioner found that satisfactory conditions existed and granted his approval.[21] The New York district court found that similar provisions of state law remained in effect during all subsequent periods pertinent to this dispute.[22] The State Industrial Commissioner's internal regulations established a union-management agreement as a condition precedent to the granting of such approval.[23]

The New York district court found that there was no evidence that the Industrial Commissioner ever granted Corning permission to employ women on the steady night shift prior to June 1, 1966, when by agreement between

---

[18] App. (3d Cir.) 183, M.D. Pa. Supp. F.F. Nos. 9-10.

[19] App. (3d Cir.) 185, M.D. Pa. Supp. F.F. No. 17.

[20] App. (3d Cir.) 177, M.D. Pa. F.F. Nos. 10-11.

[21] Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws.

[22] App. (2d Cir.) 152, W.D. N.Y. F.F. New York Labor Law, § 173(3)(a)(1) (McKinney, 1965), effective October 1, 1963, carried forward the effect of the 1953 amendment.

[23] *Cf.* 2 CCH Lab. L. Rep., State Laws ¶ 44,501 at 56,781 (1970) for the 1970 codification of similar regulations.

Corning and the union women again were employed on that shift.[24]

The district courts in New York and Pennsylvania as well as the Second and Third Circuit Courts of Appeal found that, after October 16, 1966 (Pennsylvania case), and June 1, 1966 (New York case), female employees freely availed themselves of the opportunity to work on the higher paying steady night shift jobs.[25]

---

[24] App. (2d Cir.) 152, W.D. N.Y. F.F. The Second Circuit noted that there was no evidence that Corning had sought such permission. App. (2d Cir.) 199. However, such application was a futile act under the applicable regulations (which required union approval) and also futile as a practical matter without union agreement to a changed seniority system.

[25] App. (2d Cir.) 154, W.D. N.Y. F.F.; App. (3d Cir.) 190-91, M.D. Pa. Supp. F.F. Nos. 48-52. At the Wellsboro, Pennsylvania, plant several women with no seniority were hired directly into steady night shift inspection jobs as early as March, 1967. App. (3d Cir.) 191, M.D. Pa. Supp. F.F. No. 49. Any person then employed could have claimed these jobs at that time. App. (3d Cir.) 191, M.D. Pa. Supp. F.F. No. 52. Women filled 276 of 395 openings on the steady night shift jobs prior to June, 1970. App. (3d Cir.) 50. There were 45 inspector jobs on the steady night shift. App. (3d Cir.) 32, 36, 38. Thus, each job became available approximately eight times during the four-year period following October 16, 1966.

At the Corning, New York, plants very junior employees claimed steady night shift inspection jobs. For example, an employee having only one month of service took such a job on June 5, 1966. App. (2d Cir.) 22. Thus, under the plantwide seniority system, any employee having more than one month of service could have taken that job on that date. App. (2d Cir.) 22, 23. The record shows that during the two-year period following June 1, 1966, women took 152 of 278 openings on the various steady night shift jobs involved in this case. Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253. The New York district court found that during 1969 and 1970, 126 women and 101 men accepted steady night shift work. App. (2d Cir.) 185, n.7, W.D. N.Y. F.F. The turnover in these jobs was rapid. On June 1, 1966, there were a total of 101 steady night shift inspectors. App. (2d Cir.) 52, Plaintiff's Exhibit No. 6, introduced I Tr. 24, admitted II Tr. 266. Thus, each job became available approximately three times during the following two years.

Thus, subsequent to June 1 and October 16, 1966, both men and women employed at the Corning and Wellsboro plants, respectively, worked on the steady night shift and received the higher steady night shift wage rate. As a result of these developments, all wage increases paid for jobs at the Wellsboro, Pennsylvania, and Corning, New York, plants were received by men and women alike, regardless of shift worked.[26]

In January, 1969, at the Corning, New York, and Wellsboro, Pennsylvania, plants newly negotiated labor agreements became effective, each of which included a job evaluation plan (hereinafter called the "CGW Plan").[27] The respective job evaluation agreements, and the accompanying rate agreements, established "job evaluated" wage rates for all of the production and maintenance jobs in the Wellsboro and Corning, New York, plants including the jobs involved in these cases.

The New York district court found that the disputed jobs had been rated, along with all other jobs in the Corning, New York, plants, in a "fair, non-discriminatory manner not based on sex."[28]

The "job evaluated" rates of the disputed jobs were higher than the highest rate paid for such jobs on either the day shifts or steady night shifts prior to the effective date of the January, 1969, collective bargaining agreements.[29]

---

[26] App. (2d Cir.) 154, W.D. N.Y. F.F.; App. (3d Cir.) 177, M.D. Pa. F.F. Nos. 11-12.

[27] App. (2d Cir.) 182, W.D. N.Y. F.F.; App. (3d Cir.) 189, M.D. Pa. Supp. F.F. No. 38.

[28] App. (2d Cir.) 183, W.D. N.Y. F.F.

[29] App. (2d Cir.) 183 n.4, W.D. N.Y. F.F.; App. (3d Cir.) 55, Stip. of Facts No. 112 states that "[t]he rates on both the steady night shift and the day shifts, subsequent to the agreement of January 10, 1969, are higher than the highest rate paid for work on either shift prior to the agreement of January 10, 1969."

The "job evaluated" wage rates were (and are) paid to employees, on the jobs involved in this case, who had been employed subsequent to January 20, 1969, regardless of the shift on which they are employed. Neither the New York district court nor the Second Circuit Court of Appeals found that these wage payments to persons employed subsequent to January 20, 1969, violated the act.[30]

The January, 1969, labor agreements also provided that all employees, regardless of sex, who had been employed prior to January 20, 1969, should be entitled to a "red circle" rate, which was higher than the fair, non-discriminatory "job evaluated" rate, when employed on the steady night shift inspection jobs.[31] These persons were paid the "job evaluated" rate when employed on the day shift inspection jobs.[32]

The Second Circuit concluded that had Corning and the union agreed to pay only the "job evaluated" rates there could have been "no substantial claim" of a continued violation of the Act, however, that court adopted the view that the provision for payment of a higher "red circle" rate to all persons who accepted work on steady night shift inspection jobs who had been employed prior to January 20, 1969, prevented compliance with the Act.[33]

---

[30] App. (2d Cir.) 193, W.D. N.Y. Judgment ¶ 4(a).

[31] App. (2d Cir.) 183, W.D. N.Y. F.F.; App. (3d Cir.) 192, M.D. Pa. Supp. F.F. Nos. 53-56.

[32] App. (2d Cir.) 183, W.D. N.Y. F.F.

[33] App. (2d Cir.) 200, 211-12.

IV. The decisions of the courts below on the issues presented for review

The Second Circuit Court of Appeals held that, although the issue was not "free from doubt,"[34] the legislative history of the Act indicated that Congress intended that steady night work and day work be recognized as similar "working conditions" under the Act.[35] Therefore, the court concluded that steady night shift work constituted a "factor other than sex" upon which a difference in wage rates could be based. The court held that Corning failed to carry its burden of proof, as a matter of affirmative defense, that the wage payments were based upon this factor.

The Second Circuit concluded that Corning's opening of the night jobs to women in 1966 failed to cure the violation because the court adopted the view that the legislative history indicated that the proviso in the Act which prohibits a reduction of wage rates in order to comply with the Act, really means compliance cannot be achieved unless wage rates are increased.[36]

Finally, the Second Circuit ruled that the introduction of the job evaluation plan in January, 1969, accompanied by "job evaluated" wage rates for the disputed jobs failed to achieve compliance with the Act with respect to persons employed prior to January 20, 1969, even though all wage rates had been increased, because Corning agreed to pay all such persons an even higher "red circle" rate for work on the steady night shift.[37] Although the Second Circuit

[34] App. (2d Cir.) 201.

[35] App. (2d Cir.) 203.

[36] App. (2d Cir.) 210.

[37] App. (2d Cir.) 211.

noted that had Corning agreed to pay no more than the "job evaluated" rate there clearly would have been no continued violation, it ruled that the "red circle" rate perpetuated the violation.[38]

In sharp contrast, the District Court for the Middle District of Pennsylvania, which issued its decision after the decision of the New York district court, concluded that working on a steady night shift, as compared with day work "is a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard. It is a condition under which most people would prefer not to work."[39] The court concluded that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.' Hence, Plaintiff has failed to prove a violation of 29 U.S.C. Section 206(d)(1)." [Footnotes omitted.][40]

The Second Circuit's decision had been issued prior to the argument and decision on the Secretary's appeal of the decision of the Pennsylvania district court to the Third Circuit.

The Third Circuit closely examined the Second Circuit's reading of the legislative history as to the meaning of the phrase "similar working conditions" as used in the Act, and flatly rejected that court's reading as erroneous. It concluded that the legislative history clearly supported the

[38] App. (2d Cir.) 212.

[39] App. (3d Cir.) 180.

[40] App. (3d Cir.) 180.

view that work on a steady night shift was not under a similar working condition within the meaning of the Equal Pay Act and, on that basis, affirmed the decision of the Pennsylvania district court.[41]

Neither the Pennsylvania district court nor the Third Circuit reached other issues in that case. However, it should be noted that the Pennsylvania district court issued numerous supplemental fact findings that there were substantial differences in "effort" and "responsibility" comparing the steady night shift jobs with the day shift jobs at the Wellsboro, Pennsylvania, plant. This issue was not involved in the Second Circuit case and was not dealt with by the Third Circuit in view of its agreement with Corning on the threshold issue.

Summary of Argument

The Third Circuit Court of Appeals correctly determined, in regard to Question I of the Questions Presented, that work on a steady night shift is not performed under a similar working condition to day work within the meaning of the Equal Pay Act. The Second Circuit's opposite conclusion is squarely contrary to the clear, unambiguous and carefully prepared statement of the intent of Congress, as to the explicit meaning of the term "working conditions," which was read into the Congressional Record by Representative Goodell. Goodell had authored the bill which ultimately became law, was its principal supporter in the House, and ultimately was selected to state the intent of Congress for the Record and to read the Report of the Committee on Education and Labor concerning the bill into the Congressional Record.

---

[41] App. (3d Cir.) 207.

The Second Circuit chose to disregard Goodell's statement of Congressional intent on the basis of that court's misinterpretation of the Report of the Committee on Education and Labor, which Goodell also read into the Congressional Record. The Third Circuit's analysis of the critical passage of the Report shows that the Report is internally inconsistent when interpreted as suggested by the Second Circuit and also inconsistent with Goodell's statements of Congressional intent. On the other hand, the Report is internally harmonious and is harmonious with Goodell's statements as the Report is interpreted by the Third Circuit.

Moreover, the Third Circuit's interpretation is supported by authorities in medicine, sociology, labor arbitrators, War Labor Board decisions, court decisions, and the common sense understanding of all men that working steadily at night is not a similar working condition to day work. The Second Circuit's decision is contrary to all of these authorities and to common sense.

For these reasons the decision of the Third Circuit in case No. 73-695 should be affirmed and that of the Second Circuit reversed in case No. 73-29 and judgment entered for Corning.

The remaining two Questions Presented arise out of the failure of the Second Circuit to properly apply the Equal Pay Act in determining whether, assuming a violation existed, Corning subsequently complied with the Act. The Third Circuit did not reach these questions, having decided that no violation existed.

The Second Circuit erred, in regard to Question II of the Questions Presented, by concluding that Corning's prior violation was not cured on June 1, 1966, when it

opened all jobs on the steady night shift to women, fully integrated the jobs without reducing the wage rate of any employee, and paid women the higher steady night shift wage rate.

The Second Circuit's error is plain. The court had held that work on a steady night shift would support the payment of a higher wage rate than that paid for day work, as a matter of affirmative defense, on the basis of a "factor other than sex"—but had concluded that Corning had failed to carry its burden of proof as to this factor.

On June 1, 1966, Corning removed any possibility that sex discrimination affected the entitlement of employees to receive the higher steady night shift wage rate by opening the night shift jobs to women. Within three weeks after June 1, 1966, *every* woman working on a day shift inspection job had the opportunity to work on the higher rated steady night shift counterpart to the day job on which she worked. Employees having less seniority than any of these women accepted steady night shift inspection jobs in mid-June, 1966.

Thus, the Second Circuit adopted the only basis which could conceivably remain, under the language of the Act, as support for the conclusion that Corning violated the Act after June 1, 1966. The court concluded, erroneously, that the "reduction proviso" of the Act which provides that an employer shall not "reduce the wage rate of any employee" in order to comply with the Act really means that the lower rated jobs (here the day jobs) must be *increased* to the rate of the higher rated jobs (here the steady night shift jobs).

The Second Circuit, through resort to legislative history, held that the words "shall not . . . reduce the wage rate of

any employee" as used in the Act really mean that the employer must increase the rates of all employees on the lower rated jobs. The court erred by using legislative history to change the clear meaning of the words of the statute. *United States v. Oregon*, 366 U.S. 643, 648 (1961). The words "shall not . . . reduce" are not ambiguous and were not determined to be ambiguous by the court. Moreover, the determination that those words really mean "shall increase" is not even a credible definition of the words.

The Second Circuit also erred in its reading of the legislative history which it used to create its definition of the phrase "shall not . . . reduce." Considered in its entirety the legislative history favors Corning's view that Congress intended to write the Act as it was written—that is—to require as conditions of compliance that: (1) the employer not discriminate on the basis of sex in the payment of wages and (2) no employee's wage rate be reduced to achieve that status of non-discrimination.

Corning fully complied with both of those requirements. Therefore, we request that the decision of the Second Circuit be reversed in regard to Question II and that this Court determine that Corning has been in compliance with the Act since June 1, 1966.

The Second Circuit erred, in regard to Question III of the Questions Presented, by concluding that a violation of the Act persisted after January 20, 1969, the effective date of Corning's 1969 labor agreement. This agreement, which included a new job evaluation plan, established a single "job evaluated" rate for each of the disputed jobs which was the same for all three shifts. This "job evaluated" rate was higher than the night shift rate which had been in effect prior to the 1969 agreement as well as higher than

the night rate in effect on June 1, 1966, when the night inspection jobs were opened to women. The Second Circuit ruled that the new "job evaluated" rate was a fair and nondiscriminatory rate which would have, standing alone, terminated any violation of the Act. Implicit in this ruling is a determination by the Second Circuit that the "job evaluated" day rate removed any and all effects of discrimination in the payment of wages to the day shift.

Corning and the union agreed, as part of the installation of the new labor agreement and job evaluation plan, that any person (regardless of sex) who worked the night shift inspection job and who had been employed in any job (not only inspection jobs) prior to the effective date of the agreement (January 20, 1969) would receive a "red circle" rate higher than the "job evaluated" rate. The Second Circuit held that the "red circle" perpetuated discrimination and violated the Act.

The Second Circuit seems to have focused erroneously on the wage differential between steady night work and day work and concluded that as long as a differential exists it must be a violation of the Act since it had been previously found to be a violation.

In adopting this view the court ignored the statute and failed to see that Corning clearly satisfied even the most stringent conceivable requirements of the Act no later than January 20, 1969.

The district court (New York) had found the "job evaluated" rates of the disputed jobs to be fair and non-discriminatory (and not based on sex) in relation to all of the other jobs in the plants and had found that rate to be higher than either the prior steady night shift or day rates. Moreover, the steady night shift jobs had long since been

fully integrated and all persons working day shift jobs had many opportunities to take a steady night shift job. The court erred in concluding that Corning violated the Act by agreeing with the union in collective bargaining that all persons employed prior to January 20, 1969, should receive a wage rate which was even higher than the admittedly fair "job evaluated" rate, when working a steady night shift inspection job.

There is no discrimination in the payment of wage rates on the basis of sex. There has been no reduction in wage rates in order to comply with the Act. The "job evaluated" rate is fair and non-discriminatory.

Moreover, the court's conclusion is contrary to the expressed intent of Congress to allow wide latitude to the free process of collective bargaining so long as there is no discrimination on the basis of sex.

The decision of the Second Circuit should be reversed and Corning should be found to have complied with the Act no later than January 20, 1969.

Argument

I. Work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The few facts relevant to this issue are not disputed by the parties and are identical in each of the cases pending before this Court: (1) Corning has paid a higher wage rate for work on steady night shift inspection jobs (10:00 p.m.-6:00 a.m.) than for work on those jobs during the day;[42]

[42] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. F.F. Nos. 6, 7.

(2) the higher steady night shift rate has been paid to all persons who worked those jobs on that shift;[43] (3) prior to June 1, 1966, (New York case) or October 16, 1966, (Pennsylvania case) only men worked on the steady night shift (except during World War II) and only women worked on the day shifts.[44]

The Second and Third Circuit Courts of Appeal agreed that the equal pay provisions of the Fair Labor Standards Act (hereinafter called the "Act" or the "Equal Pay Act") have no application, and that the complaints should be dismissed, unless the jobs being compared require equal skill, effort and responsibility, and are performed under similar working conditions.[45] Both circuit courts agreed that as to these matters the Secretary bears the burden of proof.[46]

---

[43] App. (2d Cir.) 150-51, 154, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. Supp. F.F. Nos. 6, 7.

[44] App. (2d Cir.) 150, 151, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. Supp. F.F. Nos. 4, 5.

[45] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207. The Equal Pay Act provides, in pertinent part, that:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work *on jobs* the performance of which requires equal skill, effort, and responsibility, and *which are performed under similar working conditions*, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ." [Emphasis supplied.] Equal Pay Act of 1963, 29 U.S.C. § 206 (d)(1).

[46] App. (2d Cir.) 201; App. (3d Cir.) 201.

A. The legislative history clearly supports the Third Circuit's interpretation of the meaning of the Act.

The decisions of each of the circuit courts turned upon their respective interpretations of legislative history indicating the intent of Congress as to whether working steadily at night is a "similar working condition" to day work within the meaning of that phrase in the Equal Pay Act.

The Second Circuit decided that steady night work is a "similar working condition" to day work. The Third Circuit decided that night differs from day.

Common experience as well as all of the competent authorities in the fields of physiology and sociology makes it plain that, as the Third Circuit held, work on a steady night shift is not work under a similar condition as day work. Judge Friendly of the Second Circuit clearly recognized this truth—during oral argument he stated from the bench: "You'd have to pay me twice as much to work at night."

It is plain that the Second Circuit was led to its incorrect conclusion that "night" was not a different working condition[47]—contrary to prevailing scientific opinion as well as to every man's experience and to the ordinary use of the words—because the court misunderstood the legislative history.

We submit that the Second Circuit erred and that the legislative history clearly supports the conclusion of the Third Circuit Court of Appeals, which had the full benefit of the Second Circuit's reasoning at the time of its decision.

Representative Charles Goodell, both circuit courts agreed, was a sponsor of the Equal Pay Act.[48] The record

---

[47] The Second Circuit stated in its opinion that the issue was "not free from doubt." App. (2d Cir.) 201.

[48] App. (2d Cir.) 205; App. (3d Cir.) 205.

shows that Congressman Goodell authored the bill which eventually became the Equal Pay Act[49] and also played a dominant role in the explanation of the meaning of the bill on the House floor.[50]

Mr. Goodell was the spokesman for the Committee on Education and Labor, which reported the bill. He was charged with the responsibility of setting forth the legislative history of the bill and then reading the Committee Report on the bill into the Congressional Record prior to the House vote.

Mr. Goodell began the process of introducing the Committee Report by noting:

---

[49] Early in the First Session of the 88th Congress, Congresswoman Green proposed a bill, H.R. 3861, regarding sex discrimination in the payment of wages. 109 CONG. REC. 2482 (House, Feb. 18, 1963). Her bill was known as the "administration bill." H.R. REP. No. 309, 88th Cong., 1st Sess., Addendum B, B-6 (Addenda are hereinafter cited as "Add. ___"). H.R. 3861 is printed at Add. C, C-1. The House Committee on Education and Labor rejected the approach taken by H.R. 3861. H.R. REP. No. 309, Add. B, B-6, 7; 109 CONG. REC. 9195 (House, May 23, 1963), Add. B, B-22, 23. On March 25, 1963, Congressman Goodell introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. *Id.*; H.R. 5605 is printed at Add. D, D-1. Virtually all of the proposals of the Goodell bill were accepted by the Committee and embodied in a new form of the bill, H.R. 6060. H.R. REP. No. 309, Add. B, B-6, 7. Congressman Goodell's bill first introduced the requirement that "equal effort, responsibility, and similar conditions" exist before the Act is applicable. *Id.*; 109 CONG. REC. 9208 (House, May 23, 1963). Although Congresswoman Green was the one who had the honor of introducing H.R. 6060, H.R. 6060 was essentially the same bill as introduced by Goodell as H.R. 5605. 109 CONG. REC. 9193 (House, May 23, 1963), Add. B, B-21. It was H.R. 6060 which became the Equal Pay Act. The text of the bill passed by the Senate (S. 1409, printed at Add. E, E-1) was amended in its entirety by insertion of the language of H.R. 6060 and then passed by the House. 109 CONG. REC. 9217-18 (House, May 23, 1963).

[50] 109 CONG. REC. 9197, 9208-9 (House, May 23, 1963), Add. B, B-26, 33-36.

"I introduced the first bill that would put this under the Fair Labor Standards Act in either body of Congress, and the first bill using the terms 'effort,' 'responsibility,' and 'working conditions' in defining equal work. Since this bill before us largely adopts my own personal views, and most of the words in this bill derive from my proposal, I would like to make clear the legislative history, and I think the chairman of the subcommittee agrees on these points:

"No. 1. Skill includes a myriad of factors. It is not limited to just a few. It includes training, experience, education, the qualities of the person himself, and a good many other factors that are too numerous to put into the bill specifically, so we used a generality in referring to them. The same is true of effort, the same is true of responsibility, and the same is true of similar working conditions." 109 CONG. REC. 9208 (House, May 23, 1963).

Representative Goodell then discussed various other matters before reading into the record detailed statements of legislative intent which were quite apparently prepared with great care and, from their context, it is certain that Goodell was speaking as representative of the Committee. These statements of legislative intent were read into the Congressional Record immediately before Goodell read the Committee Report into the record.

Congressman Goodell stated:

"Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

• • •

"Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity

worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing, as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" [Emphasis supplied.] 109 CONG. REC. 9209 (House, May 23, 1963), Add. B, B-34, 35.

The Third Circuit noted that this statement, made by the author and sponsor of the bill immediately prior to reading the Committee Report into the Congressional Record and proclaimed as an example and general guideline as to the intent of Congress, is the *only statement* on the point in dispute which is "*clear* and *unambiguous.*"[51] [Emphasis supplied.]

Goodell stated plainly that a difference in hours of work or shift was intended by Congress to constitute a difference in working conditions within the meaning of the Equal Pay Act.

The Second Circuit felt that Goodell's clear statement of Congressional intent was outweighed by the following statements in the Committee Report (which Goodell also read into the Record):

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded." 109 CONG. REC. 9210 (House, May 23, 1963), Add. B, B-40.

---

[51] App. (3d Cir.) 204-05.

The Third Circuit's analysis of the Second Circuit's error in relying upon the above-quoted statements cannot be improved upon:

> "In quoting this statement, the Second Circuit opinion interlineated the words 'differentials based on any other factor other than sex' in brackets after the words the 'broad general exclusion' in the next to the last sentence in the quoted paragraph, thus revealing its belief that a 'factor other than sex' is the 'broad general exclusion' referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word 'Thus,' should therefore be construed as listing only examples of a 'factor other than sex.'
>
> "The specific examples that the Committee Report, in the last sentence, states would be excluded are 'shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability. . . .'[20] *As a group*, these examples cannot be interpreted as 'factor[s] other than sex' for the simple reason that some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, 'lifting or moving heavy objects' is, beyond dispute, an example of 'effort,' and 'experience, training, or ability' are examples of 'skill.' And 'effort' and 'skill,' along with 'working conditions' and 'responsibility' are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as 'factor[s] other than sex'[21] to be considered as matters of defense.

"[19] 474 F.2d at 232: '"As it is impossible to list each and every exception, the broad general exclusion ['differentials based on any other factor other than sex'] has been also included."'

"[20] 109 Cong. Rec. 9210 (1963).

"[21] 29 U.S.C. § 206(d)(1).

"Of course, our interpretation of the Committee Report—that the examples set forth are not *all* 'factor[s] other than sex'—does not by itself suggest the converse—that they are *all* examples of 'skill, effort, and responsibility, and . . . working conditions.' Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (i.e., effort, skill, responsibility, and working conditions) or solely from one of its defenses ('factor[s] other than sex'), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of day worked is a 'working condition,' or a 'factor other than sex.'

"The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

> "'Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*' (Emphasis supplied)[22]

"Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an

---

"[22] 109 Cong. Rec. 9209 (1963).

"[23] 474 F.2d at 232.

example and guideline as to the intent of Congress. Whatever may be the merits of minimizing the view of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic conflict between the report and Congressman Goodell's statements. A comparison of the two demonstrates this:

"Committee Report:	Congressman Goodell:
'Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . .'	'Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor.' (emphasis supplied)
'Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded.'	'Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . .' (emphasis supplied)
'Thus, among other things . . . differences based on experience, training or ability would also be excluded.'	'Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill. . . .' (emphasis supplied)

"Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explanation would not appear inappropriate. Indeed, a sponsor's views

---

"[24] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1967), involving situations of *conflict* between Committee Reports and statements of legislators. *Cf.* American Airlines, Inc. v. C.A.B., 365 F.2d 939, 949 (D.C. Cir. 1966).

are entitled to great weight in any event.[25] As this Court stated in Gartner v. Soloner:[26]

> "'In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102.'
>
> "We conclude, then, that time of day worked is a 'working condition' within the meaning of the Equal Pay Act and not merely a 'factor other than sex' to be used by an employer as a matter of defense.[27]

[25] *See, e.g.*, National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394 (1951); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 595 (3d Cir. 1973).

[26] 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a 'factor other than sex' and not a 'working condition,' 29 C.F.R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it."

App. (3d Cir.) 203-07.

The Second Circuit also placed reliance upon the fact that a Corning representative had testified before the House Subcommittee about Corning's Job Evaluation Plan and had said nothing about steady night work as a different working condition than day work.[52]

This reliance would not appear well founded in view of the intent of Congress as found by the Third Circuit.

[52] App. (2d Cir.) 203.

These witnesses did not express a view on the question in dispute. Most important, they were not congressmen and the absence of comment on their part cannot be construed to outweigh the clearly expressed intent of Congress as spelled out by the author and sponsor of the Act and by the Report of the Committee on Education and Labor to the House.[53]

The Secretary, in its petition for a writ of certiorari in the Pennsylvania case (p. 14, n. 8), stated that Representative Goodell was not a sponsor of the bill "as the court below supposed." Our research on this question, set forth *supra*, Brief at 23 n. 49, shows clearly that he authored the bill, was selected by the Committee on Education and Labor to set forth the intent of Congress to the House and also to read the Committee Report into the Congressional Record. Clearly he was the member of Congress working for the passage of the bill who was most intimately familiar with the bill.

In *United States v. United Mine Workers*, 330 U. S. 258 (1947), this Court relied upon the testimony of Representatives Michener and LaGuardia in construing a provision of the Norris-LaGuardia Act. The Court explained why their statements were relied upon:

> "Representatives Michener and LaGuardia were members of the Judiciary Committee which reported and recommended the bill to the House. They were the most active spokesmen for the Committee, both in explaining the bill and advocating its passage. No

[53] The fact that job evaluation plans do not include time of day within "working conditions" merely means that this is an element of working conditions which is so important that unions and companies are reluctant to fix its value in relation to other factors—they want to be able to negotiate the value of this condition in free collective bargaining.

> member of the House who voted for the bill challenged their explanations. . . . We cannot but believe that the House accepted these authoritative representations as to the proper construction of the bill." [Footnotes omitted.] *United States v. United Mine Workers*, *supra*, 330 U.S. 258, 279-80.

Accord, First Nat'l. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 258-61 (1966); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-95 (1951).

The last leg upon which the Second Circuit's interpretation of the term "working conditions" rests is the "deference" [citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)] which it accorded[53a] certain interpretive bulletins which, although they are not explicit, may indicate the Administrator's belief that steady night work and day work are not to be treated as "working conditions" under the Act. The Second Circuit erred in deferring to the Administrator's regulations with respect to this issue; certainly *Skidmore v. Swift*, *supra*, does not support such deference.

Skidmore was a case in which the lower courts had ignored the Administrator's interpretive bulletin setting forth guidelines in an area in which the Administrator had considerable experience and accumulated expertise. This Court held that the lower courts had erred in failing to take into proper account the Administrator's views in an area where he had expertise. This Court also acknowledged, in *Skidmore*, *supra* at 139, that the Administrator's rulings are not arrived at as a result of adversary proceedings; they are not conclusive "even in the cases in

---

[53a] App. (2d Cir.) 205. The Second Circuit relied upon the fact that the Wage and Hour Administrator had not listed "night" in his regulations dealing with "working conditions" (29 C.F.R. § 800.132) but had listed "shift differentials" as "factors other than sex" (29 C.F.R. § 800.145).

which they directly deal, much less those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co., supra*, 323 U.S. 134, 139.[54]

In the instant case the Administrator has not issued an interpretive bulletin directly addressed to the question of whether work on a steady night shift is under a different working condition than day work.

Even more significant, however, is the fact that a determination of what Congress intended by the phrase "similar working conditions" in the Equal Pay Act is not a matter as to which the Administrator has expertise or as to which interpretive bulletins are entitled to any deference by the courts. This is particularly so where, as here, "application of the guideline [by analogy] would be inconsistent with an obvious congressional intent not to reach the employment practice in question." *Espinoza v. Farah Mfg. Co.*, 42 U.S.L.W. 4014, 4016-17 (U.S. Nov. 19, 1973).

B. Authorities in medicine, sociology, labor, and management have recognized that working regularly at night has different physiological effects upon workers than day work.

The decision of the Third Circuit is in accord with the authorities in medicine, sociology, and industry.

Those who are familiar with working on the night shift understand that it is a different working condition from day work.

As one analyst of production problems has noted:

---

[54] Congressman Goodell reaffirmed Congressional intent that the Administrator not have interpretive power regarding the Equal Pay Act. 109 CONG. REC. 9208-09 (House, May 23, 1963), Add. B, B-33, 34.

"[P]roblems result from the dislocation of everyday routines that occurs when the working day is actually a night. Inability to sleep well during the day; digestives upsets caused by odd mealtimes; exclusion from family evenings at home; having to work when friends are at play; these and other factors may produce irritability, lethargy or even antisocial behavior among employees." Steward C. Mott, *Must Night Shifts Be A Headache?*, SUPERVISORY MANAGEMENT, 20 (Nov. 1968).

The physiological effects of night work are attributable to the effects which night work has upon the night worker's daily biological rhythms.

In a book published by the United States Department of Health, Education and Welfare, these biological rhythms are described as follows:

"In concert with the turning earth, plants and animals exhibit a very pronounced daily rhythm. . . . This daily rhythm is denoted by the popular term 'circadian.' It means 'about a day,' from the Latin, *circa dies*.

". . . [M]en—indeed, most living organisms show a circadian rhythm of activity and rest. . . . Man, no exception to this daily ebb and flow, may be unaware that his body temperature, blood pressure, and pulse, respiration, blood sugar, hemoglobin levels, and amino acid levels are changing in a circadian rhythm. So, too, do the levels of adrenal hormones in his blood and concentrations of essential biochemicals throughout his nervous system. . . . As a decade of laboratory researches has disclosed, there is a rhythmic fluctuation in the contents of the urine, along with almost every physiological function, from the deposition of fat or sugar in the liver to the rate at which cells are dividing.

. . . .

"The corollary of all this circadian change is very dramatic, for a creature's strength and weakness also

vary, depending upon biological time of day." U. S. PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION & WELFARE, BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE 1 (1970).

Medical studies indicate that when a worker shifts from day work to night work, even for those whose biological rhythms can adapt to night work, it usually takes at least five or six days before that adjustment is achieved.[55] Some studies have suggested that as high as 38 percent of night workers may never adapt.[56]

However, even for those night shift workers who can adapt to night work after six days of night duty, an individual's adoption, on weekends, of a schedule of recreation by day and sleeping by night will probably cause a biological reversion to the normal daylight schedule within one or two days.[57] Of course, six more days are then required to biologically adapt to night work, assuming that the worker is one who can biologically adapt.

Thus, most night workers are usually in a physical state where their biological life rhythms are in a state of disruption.

As the Department of Health, Education and Welfare's publication BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE states:

"Many of the early studies of accidents, ill health, and performance errors among night workers were

[55] K. F. MURRELL, HUMAN PERFORMANCE IN INDUSTRY 431 (1965); W. P. Colquhoun, M. J. F. Blake, & R. S. Edwards, Medical Research Council, Applied Psychology Research Unit, Cambridge England, *Experimental Studies of Shift-Work II: Stabilized 8-hour Shift Systems,* 11 ERGONOMICS 527, 544-45 (1968) [hereinafter cited as COLQUHOUN].

[56] MURRELL, *supra* note 55, at 431.

[57] *Id.;* COLQUHOUN, *supra* note 55, at 545.

attributed to night work, itself, while the effects really came from the workers' phase shifts on weekends and time off." BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE, *supra* at 134.

A report from the British Medical Research Council Group for Research in Industrial Psychology well summarizes the physiological effects of night work as follows:

> "The interference with sleep and digestion is perhaps the most obvious and expected effect of night work and shift changes. The human body is a complicated and balanced mechanism which, when properly nourished and rested, continues to function in a smooth and effortless manner. Any marked deviation from the normal mode of life, such as the reversal of eating and sleeping habits, will naturally disturb the physiological rhythms and impose additional strains on the body mechanisms. Although the human machine is very adaptable there are limits to what it can bear and it is probably not surprising that some men were sorely tested by the change from day to night work." S. Wyatt & R. Marriott, *Night Work and Shift Changes*, Medical Research Council Group, Research in Industrial Psychology. 10 BRITISH JOURNAL OF INDUSTRIAL MEDICINE 164, 171 (1953).

As the same report from members of the British Medical Research Council notes, there are sociological disadvantages to working on the night shift:

> "[P]hysiological disturbances are, however, not the only adverse effects of night work; they are sometimes equalled or exceeded by psychological stresses and strains caused by the disruption of social and family life. Most men and women have fairly fixed habits and dislike any change in their daily or weekly routine. Evening and week-end interests and activities are often the only high lights in a rather colorless existence and anything that interferes with these pleasures is usually strongly resented. Even more serious in their effects are the mental and emotional conflicts caused by the dislocation of normal married

> life. Several men referred to this problem and their comments varied from the comparatively mild opinion that 'a week is quite long enough for the wife to be left alone at night' to admissions of strained or broken marital relations which were accentuated, if not caused, by night work." S. Wyatt & R. Marriott, *supra* at 171.

This Court, in interpreting the minimum wage provisions of the Fair Labor Standards Act, has viewed night as a condition for which payments may properly be made by employers. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948).[58] This Court stated:

> "Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor . . . ." 334 U.S. 446, 468-69.

The National War Labor Board recognized night as a different working condition than day for which an employer could properly compensate night workers in excess of day workers.

In *Firestone Tire & Rubber Co.*, 9 War Labor Reports (WLR) 726, 731-32 (1943), the following appears:

> "*Discussion—The undersirable conditions attached to night work* are present whether the work is done in steel, chemical, or rubber manufactories. Employees who forsake normal social life and endure the irregularities of sleeping and eating at unnatural hours.

[58] In that case this Court was concerned with whether increased pay rates for work at hours labeled by the labor agreement as "overtime rates" for work done outside certain regular working hours were, within the meaning of the Fair Labor Standards Act, actually "overtime rates" or whether they were really rates paid for working undesirable hours. 334 U.S. 446 (1948). This was relevant to a determination of whether the higher rates were to be included in the average base rate upon which hours in excess of 40 per week were to be paid.

should receive a special compensation to balance these disadvantages." [Emphasis supplied.][59]

Perhaps the best sources of industrial practices or labor relations "law" are the reported decisions of labor arbitrators. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581-82 (1960).

The following are quotations from a few of the many arbitration decisions which have recognized night as a different working condition:

> "The graveyard shift is generally regarded as the least desirable, and should therefore, it seems to me, receive added compensation." *Hotel Employers' Ass'n*, 18 LA 174, 183 (1952).[60]

> "It is clear that the employee who works on the third shift must necessarily live an abnormal life. For this, it is now fairly general industry practice to grant additional compensation." *Dairyland Power Cooperative*, 14 LA 737, 743 (1950).

> "Premium pay for night shift work has become a rather common method of compensating workmen for undesirable social handicaps. . . ." *Accurate Machine Tool, Inc.*, 10 LA 365, 366 (1948).[61]

Scientists and medical researchers are really just beginning to document the dramatic differences between night and day work of which night workers have complained for many years. At least one research project has produced such serious worries about the effect of night work that it concluded:

---

[59] *Accord, Western Union Telegraph Co.*, 6 WLR 133, 148-49 (1943); *Frank Foundries Corp.*, 3 WLR 223, 226-28 (1942).

[60] References "LA" are to "Labor Arbitration Reports" published by the Bureau of National Affairs, and now consisting of some 60 volumes, published at the rate of about 3 or 4 a year.

[61] *Accord, Link-Belt Speeder Corp.*, 2 LA 338, 341 (1945).

> "The only real solution to the problem is, of course, the abolition of night work except in times of emergency and in certain continuous processes. There is not the least doubt that night work is unpopular and, in the long run, is detrimental to health, efficiency, and the enjoyment of life. In every group of workers, some break down in health after a few weeks, months, or years of night work. These are the obvious casualties but it is reasonable to suppose that almost all workers are adversely affected in some degree and brought nearer to the point when the effects can no longer be ignored." S. Wyatt & R. Marriott, *Night Work and Shift Changes*, Medical Research Council Group, Research in Industrial Psychology, 10 BRITISH JOURNAL OF INDUSTRIAL MEDICINE 164, 171 (1953).

All of the above authorities in labor, management, the judiciary, science, medicine, and sociology have recognized the great extent to which a night worker works under a different working condition than the day workers.

For the reasons advanced above, we respectfully request that the decision of the Third Circuit Court of Appeals be affirmed and that the decision of the Second Circuit Court of Appeals be reversed.

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the union making the steady night shift inspection jobs available to women without reducing any employee's wage rate.

On June 1, 1966, the night shift inspection jobs at the Corning, New York, plants were opened to women.[62] After June 1, 1966, both men and women received the day inspection rate when they worked during the day and both men and women received the night shift inspection rate when

---

[62] Brief, *supra* at 9-11.

they worked during the night.[63] There was a high turnover among employees working on these jobs. In the first week the jobs were opened, women began transferring to the night shift.[63a] By June 20, 1966, every inspector who had been working on the day shift when the jobs were opened had the opportunity to transfer to the counter-part inspection job on the night shift.[63b]

In the two-year period following June 1, 1966, women took 152 of 278 openings on the 101 night shift inspector jobs involved in this case.[63c] Thus, each job became available almost three times during the two years following June 1, 1966.

After June 1, 1966, there were no distinctions in the wage rate paid to either sex.[64]

---

[63] Brief, *supra* at 9-11.

[63a] Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253.

[63b] In the first week of June 1966, D. E. Hellman took a job as General TV inspector on the night shift. Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253. Hellman had less seniority than anyone who had been working as a General TV inspector in the period when the night shift was opened to women at the start of June, 1966. *Id.* In the third week of June, 1966, W. F. Sherman took a job as a Class C inspector on the night shift. *Id.* Sherman had less seniority than anyone who had been working as a Class C inspector on the day shift in the period when the night shift was opened to women at the start of June, 1966. In the third week of June, 1966, W. D. Lovell took a job as a Class B inspector on the night shift. *Id.* Lovell had less seniority than anyone who had been working as a Class B inspector on the day shift in the period when the night shift was opened to women at the start of June 1966. *Id.* Thus, under the plantwide seniority system in effect, any employee senior to the named individuals (which included all of the day shift inspectors) could have taken these night shift inspection jobs. App. (2d Cir.) 22, 23.

[63c] Brief, *supra* at 10 n.25.

[64] Brief, *supra* at 9-11.

The Second Circuit held[65] that a violation continued, in spite of the facts outlined above, on the ground—and this is the only ground which could conceivably support such a conclusion—that Corning had violated the "reduction proviso" of the Act, which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

There was neither proof in the record nor any finding by any of the courts below that any employee's wage rate had been reduced.

However, the Second Circuit decided that the phrase "shall not . . . reduce" found in the "reduction proviso" should be interpreted to mean that the employer must *increase* the wage rate of the lower rated job.

The Second Circuit indicated with somewhat less than complete certainty that Corning was incorrect in arguing that any prior violation was cured by the opening of the night shift jobs to women. The Court of Appeals stated:

> "Although this argument [by Corning] seems persuasive at first blush, it must be rejected." App. (2d Cir.) 210.

The Second Circuit felt compelled by certain legislative history from the House of Representatives regarding the "reduction proviso" to hold that the lower rated job must always be increased to the higher rate.[66] This was improper.

---

[65] App. (2d Cir.) 210.

[66] The Second Circuit referred [App. (2d Cir.) 210-11] to statements of Representative Griffin in *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) as well as to H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963).

It is an established rule of judicial construction that legislative history should not be used to change the clear meaning of the words of the statute. *United States v. Oregon*, 366 U.S. 643, 648 (1961).[67] There was no determination by the court of appeals that there was any ambiguity in the words "shall not . . . reduce." Absent any such ambiguity in the words of the statute, there should be no resort to legislative history.

Further, assuming that resort to legislative history is justified, the legislative history relied upon by the Second Circuit is not sufficiently conclusive to justify that court's revision of the statute. On balance the legislative history favors Corning.

The Second Circuit relied upon a colloquy between Representative Griffin, Secretary of Labor Wirtz, and Representative Thompson.[68] In that colloquy Representative Griffin suggested that in some situations the job rate might equitably be reduced to a level which represented an accommodation between the old "male rate" and the old "female rate." The discussion was as follows:

> "MR. GRIFFIN. Mr. Secretary, I think this sort of brings up the question of whether or not the sole purpose of this legislation is to eliminate discrimination on the basis of sex, or whether this legislation has another purpose; namely, to raise wage levels in this country. If the only way violations of the law can be remedied is to raise wage levels, it is going to have that effect; is it not?
>
> "SECRETARY WIRTZ. Yes.
>
> "I did not mean to interrupt. Is that your question?
>
> "MR. GRIFFIN. Yes.

[67] *United States v. Oregon*, 366 U.S. 643 (1961), involved the interpretation of a federal statute dealing with the disposition of personal property of veterans who have died in a veterans' hospital, without will or legal heirs.

[68] App. (2d Cir.) 210-11.

"SECRETARY WIRTZ. The purpose of it is to eliminate the differentiation and is exclusively that.

"MR. GRIFFIN. Why, then—I am not suggesting that in every case the man should be fired or that in every case the man's wage should be lowered to the women's wage; however, I am suggesting that there may be situations where it may be necessary in order for a particular employer to stay in business, to have some accommodation between the wages paid to the men and the women. It might be equitable to pay a wage that would be somewhere in between, a wage that all would agree upon. But, as I understand it, the proposed bill would not permit that to happen.

"The only way a violation could be remedied under the bill—and certainly a union is going to insist on it—is for the lower wages to be raised to the higher.

"It seems to me there is a serious problem here that we ought to face.

"SECRETARY WIRTZ. Of course, the questions are put and the answers recognize that this was a matter of a good deal of discussion last year in connection with this legislation, and I am not sure how much I can add to that really very extensive consideration.

"I can only say that again, it would seem to me that this is a matter which will arise more infrequently. My immediate reaction is a little different from the one you have suggested about the treatment which would result in a mutually satisfactory settlement as far as all the parties are concerned.

"I think of a case that has come up under one of the State laws, Congressman Griffin, in which there was a settlement of about that same kind.

"In that case there was an adjustment worked out in a situation apparently about like the one that you have posited here, in which there was an adjustment of both the rates, to bring them into accommodation, and I can only say that with whatever question there may be about the letter of the act, if the situation

presented itself to me as administrator under the act, in which a mutually satisfactory arrangement of that kind had been made, my every disposition would be to accept that mutually satisfactory arrangement.

"MR. GRIFFIN. Of course, whenever we raise questions of this nature it is not unusual for the administrator at the present time to say, 'Well, if this came to me, I would not do such and such,' but we cannot legislate on the basis that you will always be the Secretary of Labor.

"SECRETARY WIRTZ. Completely right, and—

"MR. GRIFFIN. Of course, we expect you will be for a while at least—

"SECRETARY WIRTZ. You shame me, nor could I answer the question fairly in those terms, and I will withdraw that part of the answer, and I would simply say in a general way—well, let's let the matter end there. I appreciate your point.

"MR. GRIFFIN. I have taken more than my allotted time, Mr. Chairman, and I yield the floor.

"MR. THOMPSON. Mr. Secretary, I gather, then, that in response to Mr. Griffin's earlier question that it is not the intention of the Department or of yourself to have this become law in order to raise wages, but rather to establish the principle of equal pay for equal work, and some means by which to enforce it. Is that correct?

"SECRETARY WIRTZ. That is right, Mr. Chairman." *Hearings on H. R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 88th Cong., 1st Sess. 64-65 (1963), Add. A, A-6-8.

The Second Circuit relied upon the above-quoted statements of Representative Griffin.[69] However those statements were made on March 15, 1963, at hearings upon and in reference to H.R. 3861, a bill vastly different from the statute eventually enacted.[70] The language of H.R. 3861

[69] App. (2d Cir.) 210-11.

[70] Add. A, A-1.

explicitly stated that the lower wage rates were required to be raised.[71]

The quoted statements of both Representative Griffin and Secretary Wirtz indicated that both men were dissatisfied with any absolute requirement that the lower rate always be raised to the level of the higher. The bill which eventually passed the House, H.R. 6060, was introduced on May 6, 1963,[72] and no longer contained the language mandating an increase in the lower rate.

H.R. 6060 and the statute as enacted removed the mandate, that the lower rate be increased, which was contained in H.R. 3861. H.R. 6060 and the statute as enacted adopted the course of prohibiting a reduction in the high rated job.[73]

It is true that House Report No. 309 (in regard to H.R. 6060), also relied upon by the Second Circuit,[74] contains a one sentence reference to this matter. It states:

> "The lower wage rate must be increased to the level of the higher." H.R. REP. No. 309, 88th Cong., 1st Sess. 8 (1963), Add. B, B-4.

This sentence is the lone legislative history lending support to the Second Circuit's decision.

This sentence in House Report No. 309 is not sufficient to alter the clear words of the statute. When the Committee came to the task of writing some commentary in House Report No. 309 upon the "reduction proviso," which would be more than a mere repetition of the proviso,

---

[71] Add. C, C-5.

[72] 109 CONG. REC. 7848 (House, May 6, 1963).

[73] Add. E, E-3 and 29 U.S.C. § 206(d)(1).

[74] App. (2d Cir.) 211. The Second Circuit used only a "see also" cite to H.R. REP. 309, thus recognizing the inconclusive nature of the report.

the draftsmen may have stated without adequate deliberation what they considered to be the equivalent of that phrase without realizing that the phrases are not equivalent.

It seems probable that the legislators in the House were actually concerned with and attempting to prohibit a reduction in the higher rated job. For example, Representative Thompson in elaborating upon H.R. 6060 and, presumably, upon House Report No. 309 (produced by the subcommittee which he chaired) stated:

> "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*" [Emphasis supplied.] 109 CONG. REC. 9196 (House, May 23, 1963), Add. B, B-23.

Representative Thompson's statements indicate that he was considering only the alternatives of increasing the lower rate or reducing the higher. Opening the steady night shift jobs to women obviously did not have "an adverse effect on already established wage patterns."

The legislative history in the other legislative body, the Senate, favors Corning. It indicates that the "reduction proviso" was intended, exactly as it was written, to prohibit the reduction in the higher rated job, rather than to mandate an increase in the lower rated job.

Senate Report No. 176, for example, makes clear that the Senate felt that the "reduction proviso" was aimed at establishing that an "individual's present economic status" would not be adversely affected by the enactment of the legislation.[15]

This prohibition against a reduction of the higher rate is precisely what Congress provided in the explicit language of the Act.

---

[15] S. REP. No. 176, 88th Cong. 1st Sess. (1963), 109 CONG. REC. 8915 (Senate, May 17, 1963), Add. B, B-20.

Thus, on balance, it appears the legislative history on this matter favors Corning. The original bill, H.R. 3861, mandated an increase in the lower rated job. That requirement was removed subsequent to objections by Representative Griffin at the hearing on H.R. 3861. The Senate Report No. 176 favors Corning. The lone sentence in House Report No. 309 cannot justify revision of the statutory phrase "shall not . . . reduce" to mean "shall increase."

No resort should have been made to legislative history absent a determination by the Second Circuit that (1) the words "shall not . . . reduce" were equivocal on their face[76] and (2) that Corning might have committed some acts falling within some credible definition of "shall not . . . reduce." Not only did the Second Circuit fail to ask whether there was ambiguity in the phrase "shall not . . . reduce," but that court eventually formed a definition of "shall not . . . reduce" that meant "shall increase."

The Second Circuit also relied upon decisions in two other circuits in rationalizing its conclusion.[77] Those decisions should not be read as establishing the rule that the lower rated job must always be increased to the higher rate. In *Hodgson v. Square D Co.*[78] and *Shultz v. American Can Co.—Dixie Products*[79] the Sixth and Eighth Circuits,

---

[76] *United States v. Oregon*, 366 U.S. 643, 648 (1961).

[77] App. (2d Cir.) 211. In a third case, to which the Second Circuit made only a comparison citation, *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 226 (7th Cir. 1972), the Seventh Circuit noted that Miller Brewing, through a complex system of transferring employees, "arrived at the same result as if it had initially, after the effective date of the Equal Pay Act, equalized pay in the Analytical Lab by lowering the male employees wages by 70 cents per hour."

[78] 459 F.2d 805, 808 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972). The Eastern District of Kentucky discussed the fact that women had been discouraged from taking the higher rated job. 19 Wage & Hour Cas. 752, 754 (E.D. Ky. 1970).

[79] 424 F.2d 356, 359 (8th Cir. 1970).

respectively, dealt with situations in which the higher rated jobs were formally "opened" to women but the women had not actually been able to transfer to those jobs.[80]

The facts of the instant case were very different from *Square D* and *American Can.*

At Corning the women had immediate and frequent opportunities to transfer to the night shift.[81]

The court of appeals recognized that a considerable number of women transferred into the night jobs.[82]

---

[80] If *Square D Co.* and *American Can Co.* are read as mandating in every case, an increase in the lower rate, then Corning respectfully disagrees with those decisions for the reasons set forth herein.

[81] Brief, *supra* at 10 n. 25.

[82] App. (2d Cir.) 200. However, the Second Circuit may have been somewhat confused by certain testimony in the deposition of Earle Lewis, Plaintiff's Exhibit No. 93 [App. (2d Cir.) 133], introduced I Tr. 55, admitted II Tr. 384. Mr. Lewis testified that in 1966 there were 4 female day time inspectors whose transfer requests to go to the night shift were honored. There were 11 female daytime inspectors who had filed transfer requests which were considered "outdated" and discarded by the company. The Second Circuit seems to imply that the 11 requests which were not honored in 1966 were not honored because no vacancies existed on the night shift. App. (2d Cir.) 200 n.6. However, requests are considered outdated because either the employee has moved to another job since making the transfer request or there has been no vacancy within six months of the transfer application. App. (2d Cir.) 138. Due to the high turnover it is probable that most of the 11 female transfer requests which were considered "outdated" were so considered because the applicant had left the job from which the transfer had been requested. In 1967, out of the 61 female inspectors who sought transfers to the night shift, 39 requests were honored and 22 were considered "outdated," again, probably because the applicant had transferred. In 1968, 42 out of the 52 female inspector applicants had their transfer request honored and 10 were considered "outdated." Thus, by the end of 1968 every female inspector who had been working the day shift prior to June 1, 1966, had received numerous opportunities to transfer to the night shift. As early as June 20, 1966, every inspector who had been working on the day shift when the jobs were opened to women had the opportunity to transfer to the night shift. Brief, *supra* at n.63b.

Accordingly, neither the legislative history nor the decisions in *Square D* and *American Can* justified the revision of the "reduction proviso" made by the Second Circuit.

Further, there are good reasons why the Act reads as it does and why the courts should not rewrite it to require that the lower rated job must always be increased to the higher rate.

Congress intended to afford maximum flexibility to free collective bargaining in adjusting rate relationships. An example of this intention to allow a maximum of freedom in setting rate relationships is found in statements made, in the course of debate on the bill, by Congressman Goodell that Congress wanted:

> "[T]he private enterprise system, employer and employees and a union, if there is a union, and the employer and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it [as long as the pay differentials were not based on sex]." 109 CONG REC. 9198 (House, May 23, 1963), Add. B, B-29, 30.

The decision by the court of appeals eliminates these matters from collective bargaining and mandates an increase in the lower rate even if the employer and the union believe that the jobs should not bear the same wage rate. This will usually be disruptive of the many rate interrelationships among the jobs which are being litigated and the other jobs in the employer's establishment. This disruption can have far reaching effects upon employee job bidding tendencies and create employee dissatisfaction with rate inequities caused by this disruption.

The above-quoted statements of Congressman Goodell reaffirm the principle that the executive as well as the judicial branch of the federal government is not to alter the wage payments made by Corning subsequent to June 1, 1966, unless it is proved that those payments violate some provision of the Act.

Sound policy against judicial legislation also suggests that the Second Circuit's holding was improper. The Equal Pay Act, as enacted, set forth two requirements: (1) that the employer not discriminate between the sexes in paying wages and (2) that no employee's wage be reduced in order to reach that state of non-discrimination. Corning's conduct since June 1, 1966, clearly satisfied both requirements. A judicial rewriting of the statute so that "shall not . . . reduce" means "shall increase" introduces uncertainty into all of our laws. Such a construction, even when done with the best of intentions, is an improper exercise of the judicial function.

As Mr. Justice Cardozo stated:

> "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).[83]

In *United States v. Calamaro*,[84] 354 U.S. 351 (1957), this Court stated:

---

[83] *Anderson v. Wilson*, 289 U.S. 20 (1933), involved the issue of whether the difference between the value of real estate at the death of a testator and the proceeds realized thereafter upon a sale by the trustees may be deducted as a loss by the taxpayer, the beneficial owner of the proceeds, upon his tax return of income for the year of sale.

[84] *United States v. Calamaro*, 354 U.S. 351 (1957), involved the question of whether a "pick-up man" in a type of lottery called the "numbers game," was subject to the annual $50 special occupational tax imposed by the wagering tax provisions of the Internal Revenue Code.

> "Neither we nor the Commissioner [of Internal Revenue] may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." 354 U.S. 351, 357.

For the reasons set forth above, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since June 1, 1966.

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

Corning submits that its 1969 labor agreement, effective January 20, 1969, achieved compliance with the Act.

This agreement, which included a new job evaluation plan, established a single "job evaluated" rate for each of the disputed jobs, which was the same for all three shifts.[85] This "job evaluated" rate was higher than the night shift inspection rate had been prior to the 1969 agreement, as well as higher than the night shift inspection rate had been on June 1, 1966, when the night shift inspection jobs were opened to women.[86] The New York district court found that the 1969 "job evaluated" inspection rate, along with the rates for all other jobs in Corning, had been fixed in a "fair, non-discriminatory manner not based on sex."[87]

---

[85] Brief, *supra* at 11-12.

[86] Brief, *supra* at 11.

[87] App. (2d Cir.) 183, W.D. N.Y. F.F.

In reference to the 1969 agreement the Second Circuit stated:

> "If the agreement had stopped at that point, there would be no substantial claim of further violation of the Equal Pay Act." App. (2d Cir.) 200.

However, the Second Circuit further ruled that a violation had occurred after January 20, 1969, the effective date of the agreement, solely because Corning and the union had agreed that *any* employee who had been hired before January 20, 1969, would receive a "red circle" rate higher than the "job evaluated" rate.[88]

The "red circle" rate was payable to any person (regardless of sex) who worked the night shift inspection job, regardless of whether that person had been working as an inspector or in another type of job as long as that person had been employed prior to the effective date of the 1969 agreement.[89]

The "red circle" rate was not applicable to persons hired after the effective date of the labor agreement.[90]

The Second Circuit's reasoning on this point is not justifiable under either the terms of the Act or the premises adopted by the Circuit in its rationale supporting its decision.

The Second Circuit had found[91] that had Corning not agreed to pay more than the "job evaluated" rate, the violation would have terminated. That finding recognizes that

---

[88] App. (2d Cir.) 200, 211-12.

[89] Brief, *supra* at 12.

[90] *Id.*

[91] App. (2d Cir.) 200, 211-12. This determination was clearly correct. The rate paid to day inspectors exceeded both the rate paid to night inspectors prior to June 1, 1966, and the rate paid to night inspectors prior to the 1969 agreement. Brief, *supra* at 11.

the "job evaluated" rate, set by the January, 1969, labor agreement had removed any and all conceivable effects of past discrimination in the payment of wages to the day inspection jobs. There is no other explanation for that ruling.

The Second Circuit, however, held that Corning and the union could not set a rate for night shift inspection work which exceeded that paid for day shift inspection work. The Circuit Court held that:

> "'[T]he "red circle" rate paid to night shift inspectors perpetuates the discrimination of the "supplemental escalating shift differential"'—the euphemism Corning has coined for the excess base wage rates paid to inspectors on the night shift." App. (2d Cir.) 212.

The Second Circuit focused upon the fact that a different rate still existed for night inspection work and *ipso facto* found that a violation continued to exist.

This conclusion was erroneous. No discrimination on the basis of sex occurred by reason of the creation of the "red circle" rate. The statistics clearly establish that by 1969, women had transferred in great numbers to the night shift and would receive the "red circle" rate.[92]

If the lower "job evaluated" rate is "fair, non-discriminatory" and "not based on sex," then it should not be a violation to pay an even higher rate to all persons, including as many women as men, who work at night.

The Second Circuit's holding is also clearly contrary to the legislative intention of allowing wide latitude to the free process of collective bargaining to establish wage rates.[93]

---

[92] Brief, *supra* at 9-11.

[93] Statements of Congressman Goodell, Brief, *supra* at 48.

The Second Circuit has held that, in respect to all persons employed prior to January 20, 1969, Corning must raise the admittedly fair and non-discriminatory "job evaluated" day rate to the level of the "red circle" rate. The "job evaluated" rate was established in relation to all jobs in the Corning, New York, plants—not only the disputed jobs.[94] Thus, the Second Circuit has required Corning to create an inequity in rate relationships which inequity can only be resolved by raising, at an immense cost, the entire wage curve, affecting all jobs.

Many employers who are faced with the dual problems of a violation or potential violation of the Equal Pay Act and of bargaining with a union will inevitably seek a sensible means of compliance which will run afoul of the holding of the Second Circuit.

For the reasons set forth above, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since January 20, 1969.

[94] App. (2d Cir.) 183, W.D. N.Y. F.F.

Conclusion

For the reasons stated, it is respectfully submitted that the determination of Question I by the Court of Appeals for the Third Circuit was correct and that the determination of that Question by the Court of Appeals for the Second Circuit was incorrect. Accordingly, it is requested that the judgment of the Court of Appeals for the Third Circuit in case No. 73-695 be affirmed and the judgment of the Court of Appeals for the Second Circuit in case No. 73-29 be reversed and judgment entered for Corning. If this Court determines that the Court of Appeals for the Third Circuit erred in its resolution of Question I, then case No. 73-695 should be remanded to the Court of Appeals for the Third Circuit for proceedings consistent with this Court's determination on Question I. Further, the facts of the lawsuit from which case No. 73-695 has arisen differ from case No. 73-29 in various material respects which relate to Questions II and III. Accordingly, if this Court determines that the United States Court of Appeals for the Third Circuit should be reversed on Question I, then case No. 73-695 should be remanded to the Court of Appeals for the Third Circuit for a full consideration of all the issues. There are numerous legal issues involved in the lawsuit from which case No. 73-695 has arisen, in addition to the Questions Presented in the instant Brief.

It is requested that the judgment of the Court of Appeals for the Second Circuit be reversed in regard to Question II, and that this Court determine that Corning has been in compliance with the Act since June 1, 1966, and that the judgments of the Western District of New York and the Court of Appeals for the Second Circuit be modified accordingly.

It is requested that the judgment of the Court of Appeals for the Second Circuit be reversed in regard to Question III and that this Court determine that Corning has been in compliance with the Act since January 20, 1969, and that the judgments of the Western District of New York and the Court of Appeals for the Second Circuit be modified accordingly.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
EDWARD N. STONER II,
REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

January 23, 1974.

ADDENDUM A

Equal Pay Act

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3861 and Related Bills

TO PROHIBIT DISCRIMINATION, ON ACCOUNT OF SEX, IN THE PAYMENT OF WAGES BY EMPLOYERS ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE AND TO PROVIDE FOR THE RESTITUTION OF WAGES LOST BY EMPLOYEES BY REASON OF ANY SUCH DISCRIMINATION

HEARINGS HELD IN WASHINGTON, D.C.,
MARCH 15, 25, 26, AND 27, 1963

Printed for the use of the Committee
on Education and Labor
ADAM C. POWELL, *Chairman*

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1963

Addendum A
Hearings, p. II

COMMITTEE ON EDUCATION AND LABOR

ADAM C. POWELL, New York, *Chairman*

CARL D. PERKINS, Kentucky
PHIL M. LANDRUM, Georgia
EDITH GREEN, Oregon
JAMES ROOSEVELT, California
FRANK THOMPSON, JR., New Jersey
ELMER J. HOLLAND, Pennsylvania
JOHN H. DENT, Pennsylvania
ROMAN C. PUCINSKI, Illinois
DOMINICK V. DANIELS, New Jersey
JOHN BRADEMAS, Indiana
JAMES G. O'HARA, Michigan
RALPH J. SCOTT, North Carolina
HUGH L. CAREY, New York
AUGUSTUS F. HAWKINS, California
CARLTON R. SICKLES, Maryland
SAM GIBBONS, Florida
THOMAS R. GILL, Hawaii
GEORGE E. BROWN, JR., California

PETER FRELINGHUYSEN, JR., New Jersey
WILLIAM H. AYRES, Ohio
ROBERT P. GRIFFIN, Michigan
ALBERT H. QUIE, Minnesota
CHARLES E. GOODELL, New York
DONALD C. BRUCE, Indiana
JOHN M. ASHBROOK, Ohio
DAVE MARTIN, Nebraska
ALPHONZO BELL, California
M. G. (GENE) SNYDER, Kentucky
PAUL FINDLEY, Illinois
ROBERT TAFT, JR., Ohio

Professional Staff

LOUISE MAXIENNE DARGANS, *Chief Clerk*
RUSSELL C. DERRICKSON
DEBORAH PARTRIDGE WOLFE
RICHARD T. BURRESS, *Minority Counsel*

SPECIAL SUBCOMMITTEE ON LABOR

FRANK THOMPSON, JR., New Jersey, *Chairman*
JAMES G. O'HARA, Michigan
RALPH J. SCOTT, North Carolina
HUGH L. CAREY, New York
CARLTON R. SICKLES, Maryland

ROBERT P. GRIFFIN, Michigan
JOHN M. ASHBROOK, Ohio
ROBERT TAFT, JR., Ohio

ROBERT E. MCCORD, Director

• • •

Addendum A
Hearings p. 63, March 15, 1963

[63] Mr. GRIFFIN. Getting into some of the practical problems of making this law work—and, as I indicated at the outset, I think this is the area to which the concern is largely directed—let me give you a situation which may not be typical, but certainly is within the realm of possibility. There may be a problem in one provision of this proposed bill. The bill, in effect, says that where a violation is determined by the Secretary to exist, that the only way it can be remedied is for the wages to be raised.

This may not always benefit the ladies, although I assume most of the time it will.

I am thinking of the situation in a restaurant, for example, where a poor male waiter is competing with a nice looking blonde. In some instances, this law may help the members of my sex. In addition, there is the situation of dancers and entertainers, and so forth. I do not know what you are going to do, Mr. Secretary, to determine if there is discrimination in some of these areas.

Secretary WIRTZ. I can look into that case. [Laughter.]

Mr. GRIFFIN. Let us take a situation where there is a production line. Fifty women work for one wage and, let us say, one man, who happens to be the boss' nephew receives 50 cents an hour more. Across the street, a competitor in business has no men working at all. The women in both places are making the same wage. I also assume there would be a violation here, and I assume the only way it could be corrected would be to raise the 50 women 50 cents so they would receive the same pay as the boss' nephew, or am I mistaken, in the bill?

Addendum A
Hearings p. 63, March 15, 1963

Secretary WIRTZ. Yes; I think there is another approach. I think if I were the boss, I would forget nepotism at that point and get rid of the man whom I was paying 50 cents more just because he was my nephew. And I do not mean this lightly, Congressman, because your reference is to a set of situations which we have thought through, and realize might present some difficulty, and if there were an artificiality of that kind, I would think that good business would prompt putting him in his will instead of on his payroll, and removing this fact.

Mr. GRIFFIN. That is very interesting, and I think should be the right answer in a situation like this. Let us change the facts a little. There is a collective bargaining agreement in a particular establishment. The one man does not happen to be the boss' nephew, but he is receiving 50 cents an hour more. The only thing he does different than the ladies is to take the box off the end of the line and put it on the floor.

Now, the employer thinks—and perhaps the union in this situation also thinks—this is enough of a difference in the work so that they are all right.

Hearings p. 64, March 15, 1963

[64] I do not know at this point—and I do not know if you would know at this point—whether that would be enough of a difference in job content to justify saying that this is or is not "equal work." However, suppose that your department came along later and said, "No, this is equal work, within our regulations, and therefore you have to come into compliance and raise the 50 women 50 cents an hour."

Addendum A
Hearings p. 64, March 15, 1963

Secretary WIRTZ. I do not mean to mimimize the problem. I am perhaps entitled to say that in previous experience as a labor arbitrator, I have encountered, I suppose, a hundred or a hundred fifty, maybe 200, of these equal pay cases. It is a problem in the administration of a collective bargaining agreement and, therefore, I do not mean to minimize it; but I would add from that experience, too, that the result in most cases of this kind which come up under collective bargaining from time to time is that the matter is worked out on some adjustment basis.

I think probably it is true that private arbitration in the equal pay for equal work cases result more frequently than in any other class of grievance cases in recognizing that you have a problem which ought to be worked out by adjustment rather than enforcement.

Now I couple that experience with the experience that we have in the administration of the Walsh-Healey Act and the Fair Labor Standards Act where again our experience is that about 95 percent of all cases of violation result in voluntary compliance or an adjustment.

I would assume that the only fair answer to your question is that those problems will arise, and the procedures must be sufficiently flexible to permit the largest degree of practical working out of those situations, reserving the sanctions of enforcement only for the very few cases in which it remains.

I would repeat again that there is nothing in the act as proposed which would preclude his making administrative, managerial shifts of employment which would resolve the

Addendum A
Hearings p. 64, March 15, 1963

most extreme cases of that kind which might arise. I do not mean to duck the implications of your question. The proposal is—and I think almost necessarily—legislation which suggests that if the problem cannot be met by any of those approaches then the lower wages would be brought up to the higher level.

I am going to say that I think we are talking about a problem which will be serious as a matter of administration, but the unusual problem.

Mr. GRIFFIN. Mr. Secretary, I think this sort of brings up the question of whether or not the sole purpose of this legislation is to eliminate discrimination on the basis of sex, or whether this legislation has another purpose; namely, to raise wage levels in this country. If the only way violations of the law can be remedied is to raise wage levels, it is going to have that effect; is it not?

Secretary WIRTZ. Yes.

I did not mean to interrupt. Is that your question?

Mr. GRIFFIN. Yes.

Secretary WIRTZ. The purpose of it is to eliminate the differentiation and is exclusively that.

Mr. GRIFFIN. Why, then—I am not suggesting that in every case the man should be fired or that in every case the man's wage should be lowered to the women's wage; how-

Addendum A
Hearings p. 65, March 15, 1963

ever, I am suggesting that there [65] may be situations where it may be necessary in order for a particular employer to stay in business, to have some accommodation between the wages paid to the men and the women. It might be equitable to pay a wage that would be somewhere in between, a wage that all would agree upon. But, as I understand it, the proposed bill would not permit that to happen.

The only way a violation could be remedied under the bill —and certainly a union is going to insist on it—is for the lower wages to be raised to the higher.

It seems to me there is a serious problem here that we ought to face.

Secretary WIRTZ. Of course, the questions are put and the answers recognize that this was a matter of a good deal of discussion last year in connection with this legislation, and I am not sure how much I can add to that really very extensive consideration.

I can only say that again, it would seem to me that this is a matter which will arise most infrequently. My immediate reaction is a little different from the one you have suggested about the treatment which would result in a mutually satisfactory settlement as far as all the parties are concerned.

I think of a case that has come up under one of the State laws, Congressman Griffin, in which there was a settlement of about that same kind.

In that case there was an adjustment worked out in a situation apparently about like the one that you have posited here, in which there was an adjustment of both

Addendum A
Hearings p. 65, March 15, 1963

the rates, to bring them into accommodation, and I can only say that with whatever question there may be about the letter of the act, if the situation presented itself to me as administrator under the act, in which a mutually satisfactory arrangement of that kind had been made, my every disposition would be to accept that mutually satisfactory arrangement.

Mr. GRIFFIN. Of course, whenever we raise questions of this nature it is not unusual for the administrator at the present time to say, "Well, if this came to me, I would not do such and such," but we cannot legislate on the basis that you will always be the Secretary of Labor.

Secretary WIRTZ. Completely right, and—

Mr. GRIFFIN. Of course, we expect you will be for a while at least—

Secretary WIRTZ. You shame me, nor could I answer the question fairly in those terms, and I will withdraw that part of the answer, and I would simply say in a general way—well, let's let the matter end there. I appreciate your point.

Mr. GRIFFIN. I have taken more than my allotted time, Mr. Chairman, and I yield the floor.

Mr. THOMPSON. Mr. Secretary, I gather, then, that in response to Mr. Griffin's earlier question that it is not the intention of the Department or of yourself to have this become law in order to raise wages, but rather to establish the principle of equal pay for equal work, and some means by which to enforce it. Is that correct?

Secretary WIRTZ. That is right, Mr. Chairman.

ADDENDUM B

House Report No. 309, 88th Cong., 1st. Sess. (1963)

THE Committee on Education and Labor, to whom was referred the bill (H.R. 6060) to prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an "equal pay for women" policy.

During the 87th Congress the Committee on Education and Labor considered a number of "equal pay" bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on "equal pay" legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of "equal pay" legislation and submitted a draft bill.

Addendum B
H. R. Rep. No. 309

These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

Addendum B
H. R. Rep. No. 309

PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act.

The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to compliment the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to

the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few if any new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Addendum B
H. R. Rep. No. 309

This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management con-

tracts, enforcement is deferred for 1 additional year or until the termination of the contract, whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantially amended during consideration on the House floor. However, the administration this year adopted only a few of the changes made on the floor last year. Its proposal was embodied in H.R. 3861. On March 25 Congressman Goodell introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. Virtually all of the proposals of the Goodell bill were accepted by the House subcommittee, and are now embodied in H.R. 6060.

Addendum B
H. R. Rep. No. 309

Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:

1. The prohibition against discrimination because of sex is placed under the present Fair Labor Standards Act, with the act's established coverage of employers and employees.

2. All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under the existing Wage and Hour Division, thus avoiding the creation of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

Addendum B
H. R. Rep. No. 309

7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

PETER FRELINGHUYSEN.
WILLIAM AYRES.
ALBERT H. QUIE.
CHARLES E. GOODELL.
ALPHONZO BELL.

Addendum B
H. R. Rep. No. 309

ADDITIONAL MINORITY VIEWS

The equal pay bill, H.R. 6060, as presently written, is objectionable unless amended. The bill, as presently drawn, grants a complete hunting license to the investigators and the Department of Labor in connection with checking a business.

H.R. 6060 amends the Fair Labor Standards Act which does not grant regulatory power to the Secretary for section 6 of that act to which the equal pay amendment would be added. At first glance, H. R. 6060 might be favored, but this would be a gross oversimplification. The difference is more apparent than real. Under Fair Labor Standards Act, the Secretary has the right, and he exercises it, to issue opinion, interpretative bulletins, and questions and answers. These are issued without hearings and have the effect of regulations.

The Supreme Court of the United States established the legal similarity between regulations and interpretations when it said:

> "There is no statutory provision as to what, if any deference courts should pay to the Administrator's conclusions * * *. We consider that the rulings, interpretations and opinions of the Administrator under this act, while not controlling upon the courts by reason of their authority [do] constitute a body of experienced and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (Skidmore et al. v. Swift and Company, (1944), 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124).

Addendum B
H. R. Rep. No. 309

In H.R. 6060, the Secretary of Labor through the field of investigators of the Wage and Hour Division, armed with the Secretary's interpretations and opinions, are free to investigate and enforce at will.

The grant of authority which permits these field investigators to look for trouble, to seek out alleged pay discrimination with the same vigor with which they now seek insignificant and technical pay or overtime violations should be strenuously resisted. This was a major defect in the original administration equal pay bill.

Under H.R. 6060, the Secretary gives interpretations and opinions without hearings which have the effect of regulations. The broad unrestricted hunting license given to wage and hour investigators under H.R. 6060 is not needed in an equal pay bill and should not be tolerated.

I intend to offer an amendment which would limit the investigators' authority only to the field of the filed complaint.

Unless the approach in H.R. 6060 is amended to restrict investigations to written complaints by aggrieved employees, it should be vigorously and actively opposed.

DAVE MARTIN.

Addendum B
H. R. Rep. No. 309

ADDITIONAL VIEWS.

This bill states the commendable objective of improving job opportunities for women, but in my opinion it shows little promise of reaching that goal. The uncertainty in achievement is reflected in the mixed attitude of those supporting this bill.

Some support it as a gallant gesture to the fairer sex but insist that the legislation, if enacted, "won't amount to a hill of beans." They point to little-enforced similar legislation in some 20 States of the Union.

Still others are convinced it would be enforced. They predict it would cause employers to quit hiring women for some jobs and thus it would be a subtle but effective way to get some women out of the labor force. They support it for that reason.

A small-scale employer myself (country weekly newspaper), I believe in the principle of equal pay for women and have always tried to put this principle into practice. But I also believe legislation can sometimes do more harm than good no matter how noble the motive.

It would be risky to assume that this legislation would gather dust and not be enforced. If the Wage and Hour Division is given the assignment of enforcing equal pay for women throughout the width and breadth of this land, I, for one, expect the bureaucratic machinery to be fully staffed in short order and, from that moment on, move inexorably forward.

Addendum B
H. R. Rep. No. 309

Although this bill may have motives in the finest tradition of gallantry, it actually is about as ungallant as a kick in the shins.

Testimony before the subcommittee suggests that its enactment would worsen rather than improve job opportunities for women. One executive, for example, said his company has made studies which show the average cost of employing women is about 30 cents an hour more than in the case of men. These costs relate to rate of turnover, flexibility for overtime hours, and special facilities—not to performance when on the job.

Most of these extra costs arise from the indisputable fact that women are more prone to homemaking and motherhood than men. No one of my acquaintance would for the world want to change this fact, but it is one that enters into personnel costs. It will necessarily be considered by management in establishing wage and salary policies whether this bill passes or not.

Under the compulsion in this bill, employers who contend that employment costs for women are higher than for men will tend to cut back on female employment. The effective date of this legislation is delayed in such a manner to give employers time to make these changes. This legislation has the laudable objective of equal pay for women. If, in practice, it leads to fewer jobs for women, the victory indeed would be Pyrrhic.

PAUL FINDLEY.

Addendum B

S. Rep. 176

As printed in 109 Cong. Rec. 8914-15 (Senate, May 17, 1963)

[8914, Mr. McNAMARA:] Mr. President, like all legislation, S. 1409 contains language which must be expanded by a statement of committee intent as contained in the report which accompanied the bill.

In order that everyone may have a clear view of the committee's intent, I ask unanimous consent that portions of the report (No. 176) be printed in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

• • •

EXHIBIT 1

PURPOSE OF THE LEGISLATION

The objective of this legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages.

The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded by equal wages.

Addendum B
S. Rep. 176

Background of the Legislation

The bill, S. 1409, represents legislation recommended by the administration of President Kennedy. In his letter to Vice President Johnson urging adoption of this legislation, Secretary of Labor Willard Wirtz stressed the importance of congressional action to "eliminate discriminatory pay practices in the channels of interstate commerce." The Secretary cited three major reasons for the enactment of such legislation. (1) The general purchasing power and living standard of workers are adversely affected by discriminatory pay rates. (2) Those employers who follow the practice, thereby realize unfair competitive advantage. (3) The resulting low-wage levels prevent maximum utilization of workers' skills to the detriment of morale which in turn is detrimental to production.

At the present time, there are almost 25 million women in the American working force. It is difficult to find any single industry in the United States which does not depend to a substantial degree upon the skills, talent, and energy of American women. Yet in those statistical analyses that are available, it is overwhelmingly apparent that these important contributions by women are not rewarded in the same manner as are similar contributions by men. The committee would call particular attention to the testimony of Assistant Secretary of Labor Esther Peterson, in the charts and tables which she presented to supplement her testimony.

Addendum B
S. Rep. 176

Description of the Legislation

S. 1409 is much less complex than other equal pay bills which have been before the Congress. With a minimum of language this bill amends the Fair Labor Standards Act to provide that equal work must be compensated with equal pay, regardless of the sex of the workers.

The Fair Labor Standards Act provides, at present, that employers must pay that amount of wages which the Congress deems to be the minimum necessary for decency and basic human needs, soon to be firmed at $1.25 an hour; that employers who require the services of their employees beyond a 40-hour workweek must provide additional compensation to such employees at a time-and-one-half rate; and that the Secretary of Labor has the power to prescribe the condition and hours of work for children.

To those laudable protections, S. 1409 adds the additional requirement that no employee can be paid a wage rate less than that given to another doing the same work, because of his or her sex.

Coverage

One of the advantages S. 1409 offers over other proposed equal-pay legislation is the consistency of coverage with existing legislation. Only those employers who are now subject to the Fair Labor Standards Act will be included within the coverage of S. 1409. Other legislation introduced in this Congress would have required any employer in commerce with 25 or more employees at a single place of employment to comply with proposed equal pay legislation as a consequence, many employers not sub- [8915] ject at

present to any labor standards legislation would have been brought under such a bill. The committee believes that the uniformity of application offered by S. 1409 obviates the problems which would be created by any expansion or curtailment of labor standards coverage.

Administration and enforcement

Over the past 25 years the Department of Labor, operating primarily through the Wage and Hour Division, has established a system of administration and enforcement with which covered employers and employees have become familiar. Traditions have been established, implemented by both administrative regulation and court decision, which have become an accepted part of the rules of life in the economic community.

These same procedures and processes will be utilized in the enforcement and administration of the new equal-pay requirements. These established patterns will make the advent of this new legislation as unburdensome for those affected by it as any program we could devise. And perhaps of equal merit is the fact that no new administrative or enforcement structure need be created, since the existing units within the Department of Labor will be quite capable of supervising the new law.

Elements of equal wage

The key requirements of S. 1409 are that an employer may not discriminate in the payment of wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility and are performed under similar

working conditions, except where such a wage differential is based on any factor or factors other than sex."

The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and procedures necessary to a sound administration and enforcement of this act. The committee expects that the Department of Labor in administering the act will take this approach and will take in addition whatever steps are necessary to promote an understanding of the act and the achievement of voluntary compliance. Officials of the Department have assured the committee that they intend to consult with employers, employees, and employee representatives who will be affected by S. 1409 as well as other individuals or groups whose information and expertise in matters relating to equal-pay legislation can be helpful. These consultations will take place prior to the issuance of regulations.

With reference to the application of the equal-pay concept, it was made plain in our hearings that for a number of years knowledge has been accumulating on means to test the relationship between jobs. Knowledge of this kind will be useful in determining equal work and equal skills for the purpose of administering S. 1409.

The National War Labor Board during World War II and the Wage Stabilization Board during the Korean war were required to make comparisons of jobs for equal-pay purposes. Their experience as well as the experience of arbitrators under contract provisions for equal pay, proves comparisons can be made successfully and put to the practical end of administering a Federal equal-pay policy as contained in S. 1409.

Addendum B
S. Rep. 176

In making comparisons it has been shown that the factors affecting job content listed below may be useful: education, skill, experience, responsibility, quality and quantity of work, initiative, and ingenuity, physical effort, mental effort, hazardous or objectionable labor, and working conditions.

Exception to equal-pay requirement

S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential. For example, a woman and a man can be doing precisely the same work at adjacent posts, and yet the man may be earning substantially more than the woman, or vice versa, because of his or her tenure on the job. Such seniority systems are valid exceptions provided they are based on tenure and not upon sex.

Similarily, a merit system or piecework system which measures either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same type of work. Obviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements. Without question, employers have other valid classification programs which can justify an exception.

During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not

encounter in the employment of men. Employer witnesses called the committee's attention to the higher turnover rate among women employees because of marriage or maternity. They also cited a higher absentee rate among certain age groups of women which results from the dual role which a number of women play, that of not only worker but also wife and mother. Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits.

This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.

Addendum B
S. Rep. 176

It is the intention of the committee that where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.

Prohibition against wage reduction

This measure is intended to provide for equality of compensation. It is certainly not the intent of the committee that any individual's present economic status should be adversely affected by the enactment of this legislation. As a consequence, the bill provides that no employer, in order to comply with the other provisions of the act, can reduce the wages of any employee.

Effective date

The committee realizes that many employers, who may now be paying wage differentials that are based solely on sex, might face a severe hardship if compliance were made an immediate requirement. As a consequence the bill provides that the date of enforcement is to be a year after the date of enactment.

• • •

Addendum B

109 Cong. Rec. 9193 (House, May 23, 1963)

[9193] Mrs. FRANCES P. BOLTON. Mr. Speaker, as a long-time advocate of the principle of equal pay for equal work, I am very glad to speak in favor of H.R. 6060. I am very much interested in the remarks of the previous speaker because it is some time since the women of this country have been in the minority. We are rather far ahead of you in that regard, my distinguished colleague. Of course, if you care to be the spokesman for the actual minority. Equal pay legislation has been introduced in every Congress since 1945 by Members of both parties, a truly bipartisan effort.

The bill which is now before us is essentially the same as the one introduced in March of this year by the distinguished gentleman from New York [Mr. GOODELL]. It is a very logical approach to the problem in that it places administration of equal pay under the Fair Labor Standards Act. This alleviates the fear voiced by many that passage of such a bill would lead to the establishment of a new bureaucracy with a new set of rules and a new set of investigators. The procedures under the Fair Labor Standards Act are already well established. However, let me remind you of what the gentlewoman from New York [Mrs. ST. GEORGE] has already told us, that this bill in no way covers all the women workers of this country. Indeed, it leaves out a very great many of them. So I would like to consider this bill and have you consider it as one of the first steps toward an adjustment of balance in pay for women.

• • •

Addendum B
109 Cong. Rec. 9195 (House, May 23, 1963)

[9195] Mr. FRELINGHUYSEN. Mr. Chairman, I yield myself 6 minutes.

Mr. Chairman, I rise in support of H.R. 6060. Perhaps, as the gentlewoman from New York has stated, this proposal is too little and too late. Perhaps, as the gentlewoman from Ohio says, this is only the first step in the right direction.

Mr. Chairman, passage of this bill will mark an important milestone in the campaign for equal rights for women. Its aim is simple, few will argue about the desirability of what it seeks to achieve. Under its provisions, the women of America will be assured of equal pay when they perform equal work. This undeniable right is now to be bolstered and secured by appropriate legislative action.

As you know, Mr. Chairman, last July, during consideration of this question on the floor of the House, a number of Republican amendments were adopted. Unfortunately, the administration incorporated only a few of these changes when it submitted a new equal pay bill, H.R. 3861, this year. The shortcomings of the administration proposal were numerous, and our committee had some difficulty in working out a satisfactory bill.

Fortunately, on March 25, the gentleman from New York [Mr. GOODELL] introduced H.R. 5605. This bill, for the first time, placed the administration and enforcement of equal pay legislation under the Fair Labor Standards Act. This concept was the catalyst that had been needed. Very quickly this proposal was accepted by the members of the subcommittee. The full committee then voted its

Addendum B
109 Cong. Rec. 9195-97 (House, May 23, 1963)

approval. Finally, last week the other body passed a bill, S. 1409, which is similar in all major respects with the bill now before us.

However, H.R. 6060 differs substantially from both last year's proposals and this year's administration bill.

• • •

[9196, Mr. THOMPSON:] This legislation does not affect the wage of women vis-a-vis women or men vis-a-vis men. It only applies to instances where men and women are doing work and where there is a wage differential based solely on sex. It would make a violation of its provisions an unfair labor practice. The lower wage rate must be increased to the higher level so that there will not be an adverse effect on already established wage patterns. The language recognizes that there are many factors used to measure the relationship between jobs and which establish a valid basis for a difference in pay. We do not want to disturb these. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination. Thus among other things shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be exempted under this act.

• • •

[9197] Mr. GOODELL. Mr. Chairman, I want to commend the gentleman from New Jersey [Mr. THOMPSON] as chairman of the subcommittee, for, I think, drastically changing

Addendum B
109 Cong. Rec. 9197 (House, May 23, 1963)

and improving this legislation over what it was last year and over what was proposed earlier this year. His bill now is virtually my bill of March 1963, introduced at a time when no bill in either body of the Congress took the fair labor standards approach to equal-pay-for-women legislation.

Mr. Chairman, I want to make one major point here: Some of our colleagues are disturbed because they feel that there may be a broad, regulatory power granted to the Secretary of Labor, and I want to make it clear and have the confirmation of the chairman of the subcommittee that there is no general regulatory power granted to the Secretary of Labor under this legislation, that he will have no such power if this legislation in its present form passes the Congress.

Mr. THOMPSON of New Jersey. I agree with the gentleman from New York emphatically.

Mr. GOODELL. I thank the gentleman from New Jersey.

Mr. FRELINGHUYSEN. Mr. Chairman, I yield 10 minutes to the gentleman from Michigan [Mr. GRIFFIN].

Mr. GRIFFIN. Mr. Chairman, I want to commend the gentleman from New Jersey, the chairman of this subcommittee, for the very fair and judicious way in which he conducted the hearings and the deliberations on this legislation. As has been indicated, the bill was not handled in a hasty manner. I am glad to say that the recommendations and the arguments of the minority in this case were always given very careful consideration. Indeed, the proposal made by the gentleman from New York [Mr. GOODELL]

Addendum B
109 Cong. Rec. 9197 (House, May 23, 1963)

that the legislation should be an amendment to the Fair Labor Standards Act was a very major difference from the bill presented by the administration. The subcommittee, as well as the full Committee on Education and Labor, saw fit to adopt the approach proposed by the gentleman from New York [Mr. GOODELL]. I consider it to be a good approach, a good way to implement this basic principle which has been a part of the platforms of both of the great political parties. I refer, of course, to the principle that there should be no discrimination in the payment of wages on the basis of sex; that there should be equal pay for equal work.

It should be noted in the debate that 38 member nations of the International Labor Organization, in one of its conventions, endorsed the principle of equal pay for equal work. The countries which are members of the European Common Market, in their Rome Treaty, also endorsed this principle.

I consider this bill to be a very good and practical approach. I should like to recall for the committee that in the debate last year there were arguments centering around three amendments or points raised on the floor.

The first such amendment, it will be recalled was offered by the gentlelady from New York [Mrs. ST. GEORGE] who called for use of the term "equal work," rather than "comparable work." It will be recalled that the House adopted her amendment last year.

This bill today speaks in terms of equal work. We go further in this legislation and provide some definition as to what equal work is—what is meant by equal work. The

bill refers to jobs, the performance of which require equal skill, equal effort, equal responsibility, and which are performed under similar working conditions.

Mr. THOMPSON of New Jersey. Will the gentleman yield?

Mr. GRIFFIN. I yield to the gentleman from New Jersey.

Mr. THOMPSON of New Jersey. I am very glad that the gentleman is taking care to explain this. I believe in addition to the gentleman from New York [Mr. GOODELL] that the gentleman deserves a little credit, too, because this particular section or definition of "equal work" was a bothersome one last year. I think that the contribution which the gentleman made in adding these other factors and, rather specific ones, to it is a most valuable contribution.

Mr. GRIFFIN. I thank the gentleman from New Jersey.

Mr. GOODELL. Mr. Chairman, will the gentleman yield?

Mr. GRIFFIN. I yield to the gentleman from New York.

Mr. GOODELL. I also want to commend the gentleman for the very hard work which he did. I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

Addendum B
109 Cong. Rec. 9197-98 (House, May 23, 1963)

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear.

Mr. GRIFFIN. In other words, would the gentleman agree with me that there would be no basis for comparing, say an inspector with an assembler, for example? The Department of Labor could not say, "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility." It would be appropriate to compare inspectors with inspectors or assemblers with assemblers, but not to compare an inspector with an assembler.

[9198] Mr. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them.

Mr. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.

Mr. GOODELL. I agree with the gentleman. I wish the gentleman would yield on that point to the chairman of

the subcommittee, who made that very point yesterday to the Rules Committee.

Mr. THOMPSON of New Jersey. I do agree with what the gentleman said thus far. The gentleman said the Department of Labor could not, where these differences exist, make such determinations. There are two protections. First of all, the Department is not given that broad discretion and is deliberately restricted in the act to the definition set forth in the act.

Mr. GRIFFIN. I am very glad to have that important contribution.

Mr. THOMPSON of New Jersey. In the event in a very close matter they charge discrimination, it would be incumbent upon them to establish that before a Federal judge. Further, in the case of inspectors, someone asked hypothetically yesterday, Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

Mr. GRIFFIN. I thank the gentleman for that important comment.

Mr. GOODELL. I think the point made by the chairman of the subcommittee is important. We discussed earlier the regulatory power. The Secretary may believe that a violation exists but the court will make a second independent judgment. That is very significant. We are not allowing the Secretary of Labor to make decisions which excluded

Addendum B
109 Cong. Rec. 9198 (House, May 23, 1963)

the court from an independent new interpretation of this act, as to whether the words we use are being adminstered reasonably and properly.

Mr. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one.

Mr. GOODELL. I would like to pursue the point about differences in efforts of employees. This is perhaps the broadest category we are talking about in comparing jobs.

It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

If I may conclude on just that point: It is our intention, I believe, on both sides of the aisle to provide here with the use of the terms "effort," "skill," "responsibility" and "working conditions" a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In

this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

Mr. GRIFFIN. So long as pay differentials are not based on sex.

Mr. GOODELL. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction.

Mr. GRIFFIN. Mr. Chairman, I now yield to the distinguished minority leader.

Mr. HALLECK. Mr. Chairman, without in any way undertaking to detract from the effort that has been put into the drafting of this measure by the majority Democratic side, I would just like to put in a word of commendation at this time for our Republican members on the Committee on Education and Labor for the constructive work that they have been doing in connection with this very important measure. At times, of course, we in the minority are accused of being completely negative in our approach. I have denied that because the facts and the record do not bear out any such contention. I am happy to point out on this particular occasion that here is another evidence of what the minority can do in the way of constructive effort in the drafting of legislation that is of great consequence to the country. As a matter of fact, from what I understand, much of this bill as it now appears before us is the result of these

Addendum B
109 Cong. Rec. 9198 (House, May 23, 1963)

minority efforts and efforts that have been adopted or accepted by the majority—and for that I commend them. But, certainly, if anything can be said to be representative of bipartisan action, I think this is such a bill.

Mr. GRIFFIN. I thank the distinguished minority leader very much.

Mr. GOODELL. Mr. Chairman, will the gentleman yield further?

Mr. GRIFFIN. I yield to the gentleman.

Mr. GOODELL. We have been talking about restrictions on the regulatory power. Some of our colleagues have asked where those restrictions are in the bill. I think this is a key point. We are amending the Fair Labor Standards Act. The existing provisions of the Fair Labor Standards Act will apply for enforcement and administration. The Fair Labor Standards Act is very carefully drawn to grant regulatory authority only under certain sections of the act. It does not grant broad regulatory authority or power to issue regulations for the act in general. By this bill we are adding a new subsection of the act and we specifically make it clear that it is to be enforced in the same pattern generally as the Fair Labor Standards Act is today, which means that there is no general power to issue regulations. No power is given to the Secretary in any way to write legislation for the Congress.

Mr. GRIFFIN. I think it should be pointed out that an earlier version of this legislation did contain a section which would have authorized the Secretary to promulgate regu-

Addendum B
109 Cong. Rec. 9198 (House, May 23, 1963)

lations. The gentleman from Ohio [Mr. TAFT] provided leadership in this field; and, as a result of his persuasive ability that provision was stricken out. As a result, it should be clear from the legislative history that we do not intend to give the Secretary of Labor any broad regulatory powers. I am sure the gentleman from Ohio [Mr. TAFT] will have more to say on this subject.

Mr. GOODELL. I agree with the gentleman.

The contribution of the gentleman from Ohio was very significant in this respect.

I would like to make specific reference to the report of the other body in reference to regulation, because the other body specifically struck out the power of the Secretary to write regulations, then passed them all over.

I want to quote it because I think it is inaccurate in the other body's report, and we should repudiate it as a part of our legislative history.

They say on page 3 of the report:

> The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and procedures necessary to a sound administration and enforcement of this act.

The implication left there is that the Secretary will have the power to issue rules and regulations, but he would do it on a step-by-step basis. That is entirely wrong, it is an error, and it should be specifically stated.

Later, at the bottom of the paragraph they use another improper reference when they say:

> These consultations will take place prior to the issuance of regulations.

Addendum B
109 Cong. Rec. 9198, 9208-09 (House, May 23, 1963)

Again implying there will be regulations. There will not be in the form that the bill passed the Senate, and there will not be in the form that the bill is placed before the House.

* * *

[9208, Mr. GOODELL:] With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, we have three types of guidance that can be offered by the Administrators to those who are being regulated. One of them is legislative regulation. That is the case where Congress in effect tells the Administrator, "You write the law in these areas, you define what we mean." When they get to court under such circumstances the court will often say, "We cannot even go into that [9209] matter. Congress delegated that authority to write regulations, to write the law so do not question that. We are not even considering that here."

That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor even to issue interpretative regulations.

I emphasize that interpretative regulations are also barred. Interpretative regulations involve a case where there is an ambiguity in the law which admits of two or more constructions. Then in that case, if we have given interpretative regulatory authority, the Secretary moves in and tries to say what we meant between the two or three constructions. He does not have such authority here. The Secretary, in my opinion, has the inherent authority to write interpretative bulletins. All this amounts to is tell-

Addendum B
109 Cong. Rec. 9209 (House, May 23, 1963)

ing the public the Secretary's interpretation of the law for the guidance of those who are to be regulated. Such bulletins have no standing in court, but they are there as a guidance to the court as to what the view of the administrator was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected. He is not in violation if he has done something in reliance upon those interpretative bulletins.

• • •

Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

First. Differences in pay that exist between women alone are not covered by this act.

Second. Differences in pay that exist between men alone are not covered by this act.

Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act.

Fourth. Only those jobs that are the same and normally related shall be compared.

Fifth. Normally the jobs that are compared will be physically located in the same work area or will fall within closely related job classifications.

Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

Addendum B
109 Cong. Rec. 9209 (House, May 23, 1963)

Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination.

Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.

Tenth. A difference in pay between male selectors and packers and female selectors and packers who work on the same production line and have the same duties and responsibilities would be invalid.

Addendum B
109 Cong. Rec. 9209 (House, May 23, 1963)

Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off of the assembly line, or sweep up the room or work on the loading dock during slack periods.

Twelfth. An installer's job on an assembly line that, for example, requires soldering could not be compared or equated with a welder's job.

Thirteenth. A truck driver's job and a tug operator's job are dissimilar.

Fourteenth. The work of a machine operator and the work of a skilled machinist cannot be equated.

Fifteenth. Plant and office clerical assignments are normally distinguishable.

Mr. Chairman, the majority views and supplemental views, follow:

EQUAL PAY ACT OF 1963—MAJORITY VIEWS AND SUPPLEMENTAL VIEWS

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an equal pay for women policy.

Addendum B
109 Cong. Rec. 9209 (House, May 23, 1963)

During the 87th Congress the Committee on Education and Labor considered a number of equal pay bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on equal pay legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of equal pay legislation and submitted a draft bill.

These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

Addendum B
109 Cong. Rec. 9209-10 (House, May 23, 1963)

2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act. [9210] The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor

Addendum B
109 Cong. Rec. 9210 (House, May 23, 1963)

Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to compliment the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few, if any, new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

Addendum B

109 Cong. Rec. 9210 (House, May 23, 1963)

Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board

parlance and describes certain unusual higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management contracts, enforcement is deferred for 1 additional year or until the termination of the contract whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

Addendum B

109 Cong. Rec. 9210 (House, May 23, 1963)

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in black brackets, existing law in which no change is proposed is shown in roman):

SECTION 6 OF THE FAIR LABOR STANDARDS ACT OF 1938

"SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

"(2) if such employee is a homeworker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order, or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor, or his authorized representative, shall have power to make such regulations or orders, as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting

the generality of the foregoing, to define any operation or occupation which is performed by such homework employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term 'homeworker'; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by homeworkers;

"(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands, by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection.

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise

engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s) (3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement).

"(c) The rate or rates provided by subsection (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary

pursuant to the recommendations of a special industry committee appointed pursuant to section a: *Provided,* That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

[9211] "(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

Addendum B
109 Cong. Rec. 9211 (House, May 23, 1963)

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees

of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review

committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

"[(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying

a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"[(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"[(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"[(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.]"

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantially amended during consideration on the House floor. However, the administration this year adopted only a few of the changes made on the floor last year. Its proposal was embodied in H.R. 3861. On March 25 Congressman GOODELL introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. Virtually all of the

proposals of the Goodell bill were accepted by the House subcommittee, and are now embodied in H.R. 6060.

Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:

1. The prohibition against discrimination because of sex is placed under the present Fair Labor Standards Act, with the act's established coverage of employers and employees.

2. All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under the existing Wage and Hour Division, thus avoiding the creation of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

Addendum B
109 Cong. Rec. 9211 (House, May 23, 1963)

7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

PETER FRELINGHUYSEN, JR.
WILLIAM H. AYRES.
ALBERT A. QUIE.
CHARLES E. GOODELL.
ALPHONZO BELL.

ADDENDUM C

88TH CONGRESS
1ST SESSION

H. R. 3861

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 18, 1963

Mrs. GREEN of Oregon introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce and to provide for the restitution of wages lost by employees by reason of any such descrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

Addendum C
H. R. 3861, p. 2

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

DEFINITIONS

SEC. 3. When used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any

Addendum C
H. R. 3861, p. 3

part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(d) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(e) "Employ" includes to suffer or permit to work.

(f) "Employer" means any person having twenty-five or more employees in any place of employment and includes any person acting directly or indirectly in the interest of an employer in relation to an employee, including any person having the authority to hire, dismiss, and control the work of such employee, but shall not include the United States or any State or political subdivision of a State.

(g) "Employee" includes any individual employed by an employer.

(h) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary, to the employer

Addendum C
H. R. 3861, p. 4

of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wages paid to any employee.

(i) "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

(j) "Secretary" means the Secretary of Labor.

(k) "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

SEC. 4. (a) No employer having employees engaged

Addendum C
H. R. 3861, p. 5

in commerce or in the production of goods for commerce shall discriminate, in any place of employment in which his employees are so engaged, between employees on the basis of sex by paying wages at a rate less than the rate at which he pays wages to any employee of the opposite sex in such place of employment for equal work on jobs the performance of which requires equal skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex: *Provided,* That an employer who, on the date of this enactment, is paying a wage rate differential which would be in violation of the Act on its effective date may adjust the lower wage rate as follows:

(1) On the effective date of this Act, all wage rate differentials shall be reduced by an amount equal to 10 per centum of the higher wage rate in effect on the date of enactment;

(2) One year from the effective date of this Act, remaining wage rate differentials shall be reduced by an amount equal to 15 per centum of the higher wage rate in effect on the date of enactment;

(3) Two years from the effective date of this Act any remaining wage rate differential shall be removed.

(b) No employer shall discharge, cause to be discharged,

Addendum C
H. R. 3861, p. 6

discipline, or otherwise discriminate against any employee on account of any action taken by such employee to invoke, enforce, or assist in any manner in the enforcement of the provisions of this Act. No labor organization, or its agents, representing employees of such an employer shall cause or attempt to cause such an employer to discriminate against an individual in violation of this Act.

ADMINISTRATION AND ENFORCEMENT

SEC. 5. (a) The Secretary of Labor—

(1) shall prescribe such regulations and rules as he deems necessary and appropriate for the administration of this Act, including regulations to protect against violation of the wage standards of any other applicable law and to safeguard wage levels in the elimination of wage rate differentials under section 4(a) of this Act;

(2) may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such record (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, and matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act;

Addendum C
H. R. 3861, p. 7

(3) if a violation is found to exist, the Secretary may, before taking further action hereunder, by informal methods of conference, conciliation, and persuasion, endeavor to eliminate discriminatory practices prohibited by this Act and to secure restitution of wages which an employee would have received had the employee been paid at the rate paid the opposite sex as required by this Act and reinstatement to employment where an employee has been discharged in violation of this Act;

(4) may enter and serve upon any employer or labor organization found by the Secretary, after notice and hearing in conformity with sections 5, 6, 7, and 8 of the Administrative Procedure Act, to be engaged in or to have engaged in any violation of section 4 or section 7 of this Act, an order requiring such employer or labor organization (A) to cease and desist from such violation, and requiring such employer (B) to pay to each employee who has been adversely affected a sum equal to the amount of the wages due such employee at the rate paid to an employee of the opposite sex, plus up to an additional amount as liquidated damages not to exceed the back wages found to be due; and

(5) may enter and serve upon any employer found by the Secretary, after notice and hearing as provided in paragraph (4) hereof, to have discharged or otherwise

Addendum C
H. R. 3861, p. 8

discriminated against any employee on account of any action taken by such employee to invoke, enforce, or assist in any manner in the enforcement of the provisions of section 4 or section 7 of this Act, an order requiring such employer to reinstate such employee, or to remove such discrimination, and to pay to such employee a sum equal to the amount of the wages of which such employee has been deprived by reason of such discharge or other discrimination plus up to an additional amount as liquidated damages not to exceed the back wages found to be due.

(b) For the purpose of any investigation or proceeding conducted under this Act, the provisions of section 307 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Power Act of June 10, 1920 (16 U.S.C. 825f), shall be applicable to the jurisdiction, powers, and duties of the Secretary of Labor or any officers designated by him.

(c) The Secretary shall have power to petition any United States district court, within the jurisdiction of which the violation of this Act occurred or such person resides or transacts business, for the enforcement of any order issued under this section and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon filing of such petition, the court shall cause notice thereof to be served upon such person, and

Addendum C
H. R. 3861, p. 9

thereupon shall have jurisdiction of the proceeding, and shall have power to grant such temporary relief and restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Secretary. No objection that has not been urged before the Secretary or hearing officer shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary or hearing officer, the court may order such additional evidence to be taken before the Secretary or his hearing officer and to be made a part of the record. The Secretary may modify his findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and he shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and shall file his recommendations, if

Addendum C
H. R. 3861, p. 10

any, for the modification or setting aside of his original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals.

(d) Any person aggrieved by a final order of the Secretary issued under paragraphs (4) and (5) of subsection (a) of this section may obtain a review of such order in any United States district court within the jurisdiction of which the action in question was alleged to have been engaged in or such person resides or transacts business by filing in such court within sixty days of such order a written petition praying that the order of the Secretary be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Secretary. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Secretary under subsection (c) of this section, and shall have the same jurisdiction to grant to the Secretary such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Secretary; the findings of the Secretary with

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(e) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Secretary, as provided in this section the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (47 Stat. 70; 29 U.S.C. 101-115).

SUPERVISION OF WAGE PAYMENTS

SEC. 6. (a) The Secretary of Labor is authorized to supervise the payments of any amounts owing to any employee which have been withheld in violation of this Act. Any sum owed an employee and paid to the Secretary under this Act shall be held in a separate account and shall be paid, on order of the Secretary, directly to the employee. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury as miscellaneous receipts.

(b) No wage restitution shall be required with respect to any violation of this Act for any period which preceded by more than two years the date of commencement by the

Addendum C
H. R. 3861, p. 12

Secretary of Labor of the first administrative or judicial proceeding relating thereto.

(c) No person shall be subject to any liability for the commission of any action prohibited by this Act if he pleads and proves that the action complained of was in good faith and in conformity with and in reliance on any written interpretation or opinion of the Secretary.

GOVERNMENT CONTRACTS

SEC. 7. (a) Except as hereinafter provided in this subsection, in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all of the stock of which is beneficially owned by the United States (all of which are referred to hereinafter as agencies of the United States), for the manufacture or furnishing of any materials, supplies, articles, or equipment, in any amount exceeding $10,000, there shall be included stipulations under which the contractor (1) is required to compensate all persons employed by him in the manufacture or furnishing of such materials, supplies, articles, or equipment, in conformity with the requirements of this Act, and (2) shall be subject to all other provisions of this Act. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the

requirement of including the provisions of this subsection in any specific contract.

(b) No contract shall be awarded by the United States or any agency thereof to any person finally determined to have violated any of the provisions of this Act or any stipulation entered into in compliance with subsection (a) of this section, or to any firm, corporation, partnership, or association in which such person has a controlling interest, until or unless the contractor has satisfied the Secretary of Labor that he is complying with his obligation hereunder and that he has in good faith established and will carry out wage policies and practices to assure future compliance. The Comptroller General is authorized and directed to distribute to all agencies of the United States a list containing the names of persons ineligible for contract awards under this section. The Secretary of Labor shall cause the names of persons whom he determines to have made a satisfactory showing of present and future compliance with this Act to be removed from this list.

POSTING

SEC. 8. Every employer subject to this Act shall keep a copy of this Act posted in a conspicuous place in or about the premises where any employee is employed. Employers shall be furnished copies of this Act by the United States Department of Labor on request without charge.

Addendum C
H. R. 3861, p. 14

APPROPRIATION

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 10. This Act shall take effect one hundred and twenty days after the date of its enactment.

ADDENDUM D

88TH CONGRESS
1ST SESSION

H. R. 5605

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 1963

Mr. GOODELL introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend the Fair Labor Standards Act of 1938, as amended, to prevent discrimination because of sex in payment of wages by employers engaged in commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1963".

SEC. 2. Section 6 of the Fair Labor Standards Act of 1938, as amended, shall be amended by adding thereto a new subsection (d) reading as follows:

"(d) (1) Except as otherwise provided in this subsection, no employer having employees engaged in com-

Addendum D
H. R. 5605, p. 2

merce or the production of goods for commerce shall discriminate, within any establishment in which his employees are so engaged, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the wage rates for employees of the opposite sex in such establishment for equal work or jobs the performance of which requires equal skill, effort, responsibility, and working conditions: *Provided, however,* That such payment shall not be discriminatory within the meaning of this subsection when based upon (i) a seniority system; (ii) a merit system; (iii) a job classification system; (iv) a system which measures earnings by quantity or quality of production; (v) reasonable differentiation based on a factor or factors other than sex; or (vi) ascertainable and specific added costs resulting from employment of the opposite sex, or any combination of these exceptions.

"(2) An employee aggrieved by a violation of this section shall have the same rights and remedies with respect to an unpaid wage differential as section 16 (b) and (c) of this Act confer upon employees aggrieved by unpaid minimum wages or unpaid overtime compensation."

SEC. 3. The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment and the Administrator of the Wage and Hour Division is authorized immediately there-

Addendum D
H. R. 5605, p. 3

after to investigate violations of this subsection: *Provided,* That no action, whether for recovery of wages, liquidated damages, or injunctive relief may be brought or maintained based upon any wage payments or action taken or not taken by any employer prior to the expiration of one year from the effective date of these amendments.

ADDENDUM E

88TH CONGRESS
1ST SESSION

H. R. 6060

IN THE HOUSE OF REPRESENTATIVES

MAY 6, 1963

Mrs. GREEN of Oregon introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963,".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

Addendum E
H. R. 6060, p. 2

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

SEC. 3. Section 6 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), is amended by adding thereto a new subsection (d) as follows:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures

Addendum E
H. R. 6060, p. 3

earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"(3) For purposes of administration and enforcement any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its

Addendum E
H. R. 6060, p. 4

enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d) (4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.

ADDENDUM F

88TH CONGRESS
1ST SESSION

S. 1409

IN THE SENATE OF THE UNITED STATES

APRIL 30, 1963

Mr. MCNAMARA (for himself, Mr. MORSE, and Mr. RANDOLPH) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

---

A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce and to provide for the restitution of wages lost by employees by reason of any such discrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

Addendum F
S. 1409, p. 2

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

SEC. 3. Section 6 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), is amended by adding thereto a new subsection (d) as follows:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, responsibility, and are performed under similar working conditions, except when

such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential which would be in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"(2) For purposes of administration and enforcement, any amount owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act."

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment.

FEB 1 1974
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-29 and 73-695

CORNING GLASS WORKS, A CORPORATION,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

vs.

CORNING GLASS WORKS, A CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THIRD CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

MILTON SMITH,
General Counsel,
O. F. WENZLER,
Labor Relations Counsel,
RICHARD BERMAN,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,
GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
LAWRENCE D. EHRLICH,
JERRY KRONENBERG,
HOWARD L. MOCERF,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603.

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX.

	PAGE
Interest of the Amicus	1
Summary of Argument	3
I. Compliance with the Act Is Accomplished by Opening Up the Higher Paying Jobs on a Non-Discriminatory Basis: Notwithstanding a Finding of Prior Violative Conduct, Dissimilar Wage Rates Applied Non-Discriminatorily Between the Sexes Does Not Result in a Continuing Violation of the Act	4
A. Corning's Affirmative Action Complies with Both the Literal Mandate and the Spirit of the Statute; the Second Circuit Has Erroneously Rewritten the Act	5
B. The Lower Court's Decision Is Contrary to the Sound Policy of Encouraging Voluntary Compliance with Federal Law	10
II. The Granting of an Increased Rate of Pay Based Solely Upon Seniority to All Employees of Each Sex Employed in a Given Job Should Not Be Considered a Violation of the Act Even Where There Has Been a Finding of Prior Discriminatory Practice	13
Conclusion	16

CITATIONS.

Cases.

Brennan v. Corning Glass Works, 480 F. 2d 1254 (CA 3, 1973) 4, 9

Hodgson v. Miller Brewing Co., 457 F. 2d 221 (CA 7, 1972) 8

Hodgson v. Square D. Co., 459 F. 2d 805 (CA 6, 1972) *cert. denied*, 409 U. S. 967 (1972) 8

Keifer & Keifer v. R. F. C., 306 U. S. 381 (1939) 12

National Woodwork Mfgs. Assn. v. N. L. R. B., 386 U. S. 612 (1967) 9

Pan American World Airways, Inc. v. C. A. B., 380 F. 2d 770 (CA 2, 1967) *aff'd.*, 391 U. S. 461 (1968) 9

Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (CA 8, 1968) 12

Schneider v. Rusk, 377 U. S. 163 (1964) 12

Schultz v. American Can Co.—Dixie Products, 424 F. 2d 356 (CA 8, 1970) 8

Schwegmann Bros. v. Calvert Corp., 341 U. S. 384 (1951) 9

Shapiro v. Thompson, 394 U. S. 618 (1969) 12

United States v. Bethlehem Steel Corporation, 446 F. 2d 652 (CA 2, 1971) 9

United States v. Jacksonville Terminal Co., 451 F. 2d 418 (CA 5, 1971), *cert. denied*, 406 U. S. 906 (1972) 9

U. S. v. Missouri Pacific R. Co., 278 U. S. 269 (1928) 278 7

U. S. v. Oregon, 366 U. S. 643 (1961) 649 7

United States Department of Agriculture v. Murray, ... U. S. ....., 93 S. Ct. 2832 (1973) 12

Statutes.

Equal Pay Act of 1963 (77 Stat. 56), 29 USC Sec. 206(d)(1) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Title VII of the Civil Rights Act of 1964 (78 Stat. 253), 42 USC Sec. 2000e, *et seq.* 9, 10

U. S. Const., Fifth Amendment 12

Miscellaneous.

109 Cong. Rec., House (1963),

P. 9196 ..... 7, 9

P. 9198 15

P. 9209 9

H. R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963), 109 Cong. Rec.

P. 2909 ..... 7, 14

P. 2910 14

S. Rep. No. 176, 88th Cong., 1st Sess. 8 (1963) 109 Cong. Rec. 8915 ..... 7, 8

Hearings on H. R. 3861 and Related Bills Before the Special Subcommittee on Education and Labor, 88th Cong., 1st Sess. 65 (1963) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-29 and 73-695.

CORNING GLASS WORKS, A CORPORATION,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR.
Respondents.

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

vs.

CORNING GLASS WORKS, A CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THIRD CIRCUITS.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the Chamber of Commerce is set forth in the previously filed "Brief on Behalf of the Chamber of Com-

merce of the United States of America, as *Amicus Curiae*, in Support of the Petition for Writ of Certiorari" in Case No. 73-29. Pursuant to Rule 42 of this Court, consents from all parties have been obtained for the Chamber's participation as *amicus curiae*.

SUMMARY OF ARGUMENT.

This case presents the Court for the first time with the question of the manner by which compliance with the Equal Pay Act of 1963 can be achieved. The import of the decision below, in Case No. 73-29, is best understood in the factual context out of which this case arose.

Prior to June 1, 1966, at its Corning, New York facilities, Corning paid employees working as night shift inspectors at a higher rate than it paid day shift inspectors, and only men worked as night shift inspectors. After June 1, 1966, although the pay rate differential between the night and day shift jobs was maintained, the two jobs were made equally available to employees of each sex and sexual integration of the jobs was substantially achieved. Both male and female day shift inspectors received the same day shift rate. Night shift inspectors, both male and female, received the same higher night shift rate. Effective January 20, 1969, as a direct result of collective bargaining negotiations, the pay rate on the two jobs was equalized at a new rate higher than the rate previously existing for either job and an additional wage rate premium, based solely upon seniority (a "red circle" rate), was granted to every person employed on or prior to the date of the Agreement, male or female, who at any time thereafter worked as a night shift inspector.

Viewing this factual pattern, the Second Circuit, in Case No. 73-29, held that the day and night shift jobs were "equal", that Corning's sexual integration of the night shift job did not cure its prior violation, and that the "red circle" rate further perpetuated the violation.[1] According to the Second Circuit's

1. The Second Circuit, Case No. 73-29, and the Third Circuit, Case No. 73-695, disagree on the threshhold issue of whether day work and night work are performed under similar working

interpretation of the Act, compliance can only be achieved by equalizing the wage rates for both jobs at the higher night rate —in this case the higher night shift contained in the 1966 collective bargaining agreement. This interpretation is contrary to both the philosophical precepts and literal reach of the Act. It imposes liability on an employer whose current practices are in accord with the mandate of the Act,—based solely on a past practice which is no longer operative or effective,—and discourages voluntary compliance.

It is submitted that the Second Circuit's view should be rejected, and that this Court should conclude that compliance with the Act is achieved by action which makes the higher paying job equally available to members of either sex and which pays all employees performing that job at an equal rate of pay.

I.

COMPLIANCE WITH THE ACT IS ACCOMPLISHED BY OPENING UP THE HIGHER PAYING JOBS ON A NON-DISCRIMINATORY BASIS: NOTWITHSTANDING A FINDING OF PRIOR VIOLATIVE CONDUCT, DISSIMILAR WAGE RATES APPLIED NON-DISCRIMINATORILY BETWEEN THE SEXES DOES NOT RESULT IN A CONTINUING VIOLATION OF THE ACT.

The Court below held that past sexual discrimination between equal jobs may be presently remedied *only* by raising the rate of the lower paying jobs to that of the higher, rather than to

---

conditions and are thus "equal" within the meaning of the Act. The Third Circuit, *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254 (CA 3, 1973), examined both the substantially identical factual pattern arising at Corning's Wellsboro, Pennsylvania location and the legislative history of the Act, and concluded in agreement with Corning, that the time of day is a working condition within the meaning of the Act. Accordingly, the Third Circuit held that Corning had not violated the Act. As a result, the court found no need to consider whether Corning's action in sexually integrating the night shift job constituted compliance. The Chamber agrees with the reasoning and conclusion of the Third Circuit with respect to this threshhold issue. However, because of the significance that the question concerning the means of compliance has for all employers subject to the Act and for industry generally, the Chamber confines its remarks herein to that issue.

make effectively available to both sexes the equal opportunity to work both jobs. The Court's holding fails to comport with the unambiguous language of the Act, results from a mistaken interpretation of the legislative history, and results in a legal anomoly which is contrary to the sound policy of encouraging voluntary compliance and could not have been intended by Congress.

A. Corning's Affirmative Action Complies With Both the Literal Mandate and the Spirit of the Statute; the Second Circuit Has Erroneously Rewritten the Act.

The Act provides only that "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages—at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . ."[2]

On June 1, 1966, Corning voluntarily made the higher paying night shift inspection jobs equally available to members of either sex on a non-discriminatory basis, and paid *any* employee holding such job at the *same* rate as all other employees performing that job. After that date, there were

2. Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. Sec. 206(d)(1). Section 6(d)(1) provides in full:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

no distinctions in the wage rate paid to either sex.[3] Thus, the statutory basis for the finding of a violation was eliminated and Corning was in compliance with both the literal mandate and spirit of the Act.[4]

However, the Second Circuit held that Corning's affirmative and total elimination of any sexual basis regarding pay rates on the night inspection job did not achieve compliance with the Act. The Court relied for this holding principally on its reading of certain legislative history in interpreting what is called the "reduction proviso" of the Act. That proviso states:

> [A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U. S. C. Sec. 206(d)(1).

The action instituted by Corning in June 1966 does not fall within the ambit of the reduction proviso, for that action did not operate to reduce the wages of any employee in order to comply with the provisions of the Act, but rather, was a successful affirmative effort to make the better paying night shift inspection job equally available on a non-discriminatory basis to employees of each sex.[5] However, the Second Circuit interprets the proviso language "shall not reduce" to mean "shall increase the wage

---

3. These findings were made by the District Court. See, 319 F. Supp. 1161 (W. D. N. Y., 1970) at 1166, 1168.

4. This is true because there was then no longer any sexual discrimination on the night shift inspector jobs. Such jobs were equally available at the same rates regardless of sex, and, as found by both the District Court, 319 F. Supp. 1161, at 1166, and the Court of Appeals, 474 F. 2d 226, at 230, a number of women took advantage of this opportunity, and over half of the vacancies occurring in night inspection jobs were taken by women. Similarly, after June 1, 1966, the day shift inspection jobs were equally available to both sexes, and the pay for those jobs, though less than the pay for night shift, was uniform for all day shift inspectors.

5. There is no finding by any of the Courts below that any employee suffered a wage reduction as a result of Corning's action. Obviously, no wage reduction could occur as a result of Corning's action.

rate of the lower rated job"[6] and, therefore, construes the Act to require that in every case of a prior violation, present compliance with the Act can only be achieved by increasing the lower rated job to the level of the higher.[7] The court's reliance on legislative history is misplaced when it is interpreted, as the court does, to alter or rewrite the clear meaning of the language specifically set forth in a statute.[8]

Further, the legislative history does not support the interpretation given the proviso by the court below. Rather, that history reveals that Congress' *only* concern was to rule out the possibility that compliance with the Act might be accomplished by reduction in the rate of the higher rated job. Thus, for example, in the House, Representative Thompson explained that "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*"[9] In the Senate, that section of the Report ex-

---

6. 474 F. 2d at 235.

7. The legislative history relied upon by the Second Circuit in support of its interpretation are statements of Representative Griffin in *Hearings on H. R. 3861 and Related Bills Before the Special Subcommittee on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) and H. R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963) 109 Cong. Rec. 2909. See, 474 F. 2d at 234-5. While it is true that the authority relied upon by the Second Circuit contains statements that the lower rate should be increased, those statements, standing alone, do not support the court's interpretation of the proviso. The purpose of the proviso was fully explicated on the floor of the House and in the Senate Report, see remarks for Congressman Thompson and S. Rep. No. 176, *infra*. Read together, the statements relied on by the Second Circuit and those of Congressman Thompson and the Senate Report reveal a consistency of intent—to prevent the incongruous result that compliance with the Act would be achieved by lowering existing wage rates. Compliance achieved by opening up the higher paying jobs to women does not have such a result. See, discussion *infra*.

8. *U. S.* v. *Oregon*, 366 U. S. 643 (1961) 659; *U. S.* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (1928) 278, wherein this Court firmly established the principle that isolated statements of legislators and legislative history should not be used to support a construction contrary to the clear language of the statute.

9. 109 Cong. Rec. 9196 (1963).

plaining the proviso declared that its specific purpose was to assure that no "individual's present economic status should be adversely affected by the enactment of this legislation."[10] This intention is reflected in the unambiguous language of the proviso. Corning's actions clearly did not run afoul of the evil Congress sought to prohibit by the proviso because that action, while successfully making the higher paying job available to both sexes on a non-discriminatory basis, was not accomplished by a reduction in wage rates and caused no employee to suffer adverse economic consequences.

Simply, the Second Circuit has erroneously and unjustifiably expanded the "reduction proviso" to prohibit all but a single means of achieving compliance with the Act.[11]

Moreover, as a result of its persuasion to expand the reach of the proviso beyond the intent of Congress, the Second Circuit failed to consider specific statements of Congressional purpose contrary to the court's interpretation and corroborative of the position taken by Corning. For example, Congressman Frelinghuysen stated:

> "Nothing in this bill prohibits discrimination in pay strictly between women or strictly between men. *Discrimination*

10. S. Rep. No. 176, 88th Cong., 1st Sess., 109 Cong. Rec. 8915 (1963).

11. The Court below has relied essentially upon three cases to support its interpretation: *Schultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356 (CA 8, 1970); *Hodgson* v. *Square D. Co.*, 459 F. 2d 805 (CA 6, 1972) *cert. denied*, 409 U. S. 967 (1972); and *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221 (CA 7, 1972). The *bona fides* of Corning's program of sexual job integration distinguishes these cases from the instant preceding. *Square D* and *American Can* involved situations in which the higher rated jobs had been opened to women but the women were effectively precluded from being able to work those jobs. Here, however, the courts below specifically found that sexual integration of the night inspection job had been substantial. In *Miller Brewing*, the Court found that the Employer, through a complex system of transferring employees, had arrived at the same result as if it had equalized the pay rate initially by lowering the wages of male employees. In the instant case, as found by the courts below, no employee suffered a wage reduction as a result of Corning's method of achieving compliance.

that operates against both men and women is not prohibited. The only thing prohibited is a difference in pay that is based on sex."[12]

Congressman Goodell, sponsor of the Equal Pay Act, speaking to the issue directly involved here, stated: "Differences in pay between groups or categories of employees that contain both men and women within the category are not covered by this Act."[13] Corning made all jobs on both shifts equally available to all who applied, irrespective of sex, and paid the uniform rates set for each shift, again, irrespective of sex. Corning, by its own affirmative action, eliminated the statutorily prohibited discrimination. For the Second Circuit to insist now,—as a current means for redressing a voluntarily discontinued practice which sexually restricted the night shift job—that *non*-sexual distinctions, of whatever kind for whatever purpose, may not be maintained, is unsupported by the Congressional purpose.[14]

---

12. 109 Cong. Rec. 9196 (1963) (Emphasis added).

13. 109 Cong. Rec. 9209 (1963). As pointed out by the Third Circuit in Case No. 73-695 below, this Court accords great weight to a sponsor's views in attempting to extract the legislative purpose. 480 F. 2d 1254, 1260 (CA 3, 1973). See, e.g., *National Woodwork Mfgs. Assn.* v. *N. L. R. B.*, 386 U. S. 612 (1967); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); *Pan American World Airways Inc.* v. *C. A. B.*, 380 F. 2d 770 (CA 2, 1967) *aff'd.*, 391 U. S. 461 (1968). Mr. Goodell's remarks clearly support the position that after June 1, 1966, Corning was in compliance with the Act.

14. The lower court's construction of the remedial requirements of the Equal Pay Act conflicts in principle with approach taken by the courts in remedying sex and race discrimination under Title VII of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U. S. C. Sec. 2000 (e) *et seq*. The concept of past violations tainting present conduct is a theory rooted in cases arising under Title VII. In such cases, the remedy is to order the employer to do just what Corning did in 1966, i.e, permit the members of the alleged class of discriminatees to take the better paying and more desirable jobs as vacancies occur. See, e.g., *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA 5, 1971), *cert. denied*, 406 U. S. 906 (1972); *United States* v. *Bethlehem Steel Corporation*, 446 F. 2d 652 (CA 2, 1971). The Chamber perceives no basis in the

B. The Lower Court's Decision Is Contrary to the Sound Policy of Encouraging Voluntary Compliance With Federal Law.

The lower court's decision is based on the theory that a specifically eliminated, non-currently operative past practice is a sufficient basis upon which to predicate the finding of a present violation of the Act. Under this construction, current compliance with the literal mandate of the Act could never be attained by sexual job integration if the rates of pay on the compared jobs were not also equalized. As a consequence of having to equalize the wage rate between the jobs being compared, an inequity in the rate relationships between those jobs and all others would result. Since all jobs are rated and some jobs, because of required skill, training, and experience, are rated higher than others, the employer could not equitably raise the rate on jobs requiring less skill, experience and training to a higher level without raising the rate of all jobs an equivalent amount. His failure to do so would cause justified employee dissatisfaction. The employer, in order to correct this inequity, might be required to readjust its entire wage structure at a cost which would be competitively prohibitive.

In addition to the adverse effect on employers who would predictably suffer from the competitively disadvantageous position in which the lower court's construction would place them. the employees, too, would be disadvantaged from so far reaching a remedy. In an industry's marketplace, no employer can be foreclosed from options available to others without uniform cost both to them and their employees' security. A representative circumstance may serve to illustrate. Assume an employer has two jobs which are "equal" within the meaning of the Act. Job A pays $100 per week and Job B pays $200 per week.

---

legislative history of the Equal Pay Act for the application of a different and more harsh remedy under that statute than if the same factual situation were attacked under the sex discrimination prohibitions of Title VII.

At some time in the past, the employer employed only women in Job A and only men in Job B. Under the holding of the Second Circuit, no matter how successfully this employer has altered his present employment practices to allow both men and women to be employed in the higher paying Job B, the only appropriate remedy is to compel both the lower rated Job A as well as Job B to be paid at the same rate of $200 per week.

However, assuming another employer elects to enter the industry for the first time, therefore without any past history of sexually discriminatory conduct, and has the identical jobs (A and B) but employs men and women to occupy each job, then that employer is in compliance with the Act although he is lawfully permitted to pay employees performing Job A at the rate of $100 per week and employees performing Job B at the rate of $200 per week. Since the two employers are in direct competition, the economically disadvantageous position in which the former is necessarily placed can only insure that adverse consequences will accrue both to him and his employees. The ultimate result of forcing him to absorb such artificially imposed increases in labor costs may well be the loss of his business or, at minimum, a reduction in the number of available jobs. The frequency with which this situation is likely to arise under the equal pay laws renders this a most serious problem for industry. There may frequently occur instances in which statutorily "equal" jobs contain different wage rates for reasons that have nothing to do with sexual discrimination.[15] That an employer may, in the past, have restricted access to the higher paying job on the basis of sex should not result in a prohibition without future limit against differentiation between jobs on a basis other than sex.

Yet that unfortunate and unnecessary result is compelled by the Second Circuit's construction of the Act. It will inevitably

15. An employer may, for example, realize greater profits in one department than another, though the jobs performed are "equal," and he may desire to pass those profits on to his employees on a wholly non-discriminatory basis within each department. Nothing in the statute prohibits his doing so.

lead to serious business difficulties for numerous affected employers required to make severely uncompetitive and illogical adjustments to "remedy" voluntarily discontinued conduct. Such a result could not have been Congressionally intended. Indeed, a statutory construction which leads to such a result is in conflict with the established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381 (1939).[16]

Such a purpose is not reflected either in the legislative history or the statutory language. It substantially subverts the efforts of employers such as Corning to voluntarily comply with the Act by tainting their otherwise valid and successful compliance efforts, should there ever be a finding of prior violation.[17] In general, voluntary compliance is discouraged if

16. Although not raised below, the Second Circuit's construction could very well render the Act unconstitutional. The due process clause of the Fifth Amendment requires that Acts of Congress operate equally on all persons in like circumstances and not operate as a partial law affecting the rights of or imposing burdens on a particular individual or class in a way in which the rights of other persons, similarly situated, are not affected or burdened, unless the restraint or imposition has some rational basis germane to the substantive purposes of the legislation. See, for example, *Schneider* v. *Rusk*, 377 U. S. 163 (1964); *Shapiro* v. *Thompson*, 394 U. S. 618 1969; *United States Department of Agriculture* v. *Murray*, ... U. S. ...., 93 S. Ct. 2832 (1973). Here, the Second Circuit would impose upon an employer whose current non-discriminatory practices are the same as other employers, a burden not imposed on those others because of a prior practice that has been totally eliminated. The elimination of the prior practice is the object of the Act. The disparate treatment of employers whose current practices place them in like circumstances with other employers who are in compliance with the Act has no rational relationship to legitimate goals of the Equal Pay Act. The Second Circuit's interpretation thus appears to operate as a denial of due process, a result Congress could not have intended.

17. The remedy fashioned by the Second Circuit thus renders the Act punitive rather than remedial. This can only discourage successful voluntary compliance contrary to the judicially approved view that appropriate remedies should be fashioned to encourage successful voluntary efforts to rectify existing statutorily violative conditions. See, e.g., *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA 8, 1968).

compliance involves such extraordinary, unbusinesslike and uncompetitive conduct as that compelled by the Second Circuit. Such unfortunate results should be rejected by this Court; they could not, on rational analysis, have been intended by Congress.

II.

THE GRANTING OF AN INCREASED RATE OF PAY BASED SOLELY UPON SENIORITY TO ALL EMPLOYEES OF EACH SEX EMPLOYED IN A GIVEN JOB SHOULD NOT BE CONSIDERED A VIOLATION OF THE ACT EVEN WHERE THERE HAS BEEN A FINDING OF PRIOR DISCRIMINATORY PRACTICE.

Effective January 20, 1969, and as a direct result of collective bargaining negotiations between Corning and the Union representing the employees here affected, a job evaluation plan was instituted under which the disputed jobs, and all other jobs at the Corning, New York location, were rated. Pursuant to that plan, the existing wage rate differential between day shift inspectors and night shift inspectors was abolished. A new wage rate, higher than either of the former rates, was established. However, in order to reach agreement, Corning and the Union provided, in the collective bargaining agreement, that *all* employees who were employed prior to the effective date of the agreement would henceforth receive additional compensation when working as night shift inspectors. This additional compensation or "red circle" rate was based solely on seniority and applied to both *men and women* since the affected jobs were then fully sexually integrated.[18]

The Second Circuit conceded that had Corning done no more than institute the job evaluation plan, which fairly rated the disputed jobs, there would have been no claim of continued

18. Such "red circling" is not uncommon in collective bargaining agreements. Increased pay, benefits and job protection, based on seniority, is one of Labor's main goals in negotiations. As a result, "red circling" of senior employees is often a necessary method of giving effect to the Union's seniority demands and a basis for reaching agreement.

violation. However, the Court below found that the "red circle" rate perpetuated the prior violative conduct,[19] and held that Corning could only cure its continuing "violation" by raising its admittedly fair and non-discriminatory evaluated rate to the "red circle" rate.

The Second Circuit's conclusion is in contravention of both the literal wording of the Act which permits differentials based on seniority, and the express intent of Congress that the Act should not interfere with and restrict the collective bargaining process in the establishment of non-sexually discriminatory wage rates. The Court's holding disregards the fact that the sole eligibility criteria necessary for the attainment of the "red circle" rate was employment as of the date of the execution of the 1969 agreement. The sex of any otherwise eligible employee has no impact upon whether or not such employee is paid the "red circle" rate. In the instant context, where night shift inspectors work is equally available to members of each sex and any employee in the plant, regardless of sex, is paid the "red circle" rate if such employee has the necessary seniority, neither an overt nor an insidious sexual discrimination is properly inferrable.[20] Since "seniority" is a statutorily specified permissible basis for a wage rate differential, the effect of permitting a judicial holding predicated upon such an inference would be to eliminate this specific statutory defense in all instances where an employer at some prior time had engaged in violative conduct.[21]

---

19. 474 F. 2d 226, 235.

20. Since the eligibility date for entitlement to the "red circle" rate was January 20, 1969 and *all* employees—male and female alike—employed on that date thus automatically became eligible for the "red circle" rate, the "red circle" rate could not possibly have perpetuated any past discrimination based on sex.

21. Moreover, H. R. Rep. No. 309, *supra*, 109 Cong. Rec. 2909 (1963) 2910 specifically acknowledges that "red circle" rates are exempt from the coverage of the Act:

> "It [exemption No. iv—a differential based on any other factor other than sex—] also recognizes certain special circumstances,

Further, since the basis of the "red circle" rate was seniority and not sex, the Second Circuit's holding would require Corning to abrogate non-discriminatory wage rates arrived at in a fair and freely negotiated collective bargaining agreement. Such action is not only not required by the Act but is contrary to the intent of Congress to preserve, consistent with the Act, the national policy of giving full play to the process of collective bargaining. In this regard, Representative Goodell, the sponsor of the Act, stated, in an exchange during the House debates, that:

> "[W]e want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.
>
> "Mr. Griffin: So long as pay differentials are not based on sex.
>
> "Mr. Goodell. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction." 109 Cong. Rec. 9198 (1963).

The result reached by the Second Circuit is not justified either under the literal wording of the Act or any reasonable interpretation of the legislative history.

---

such as 'red circle rates.' This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons."

Here the reason was purely seniority, a reason expressly made valid by the specific language of the Act.

CONCLUSION.

For the reasons stated herein, together with those additionally urged by Corning, the Petitioner in Case No. 73-29, the Court is respectfully urged to reverse the Second Circuit with respect to the question of the manner by which compliance with the Act may be achieved.

Respectfully submitted,

MILTON SMITH,
General Counsel,

O. F. WENZLER,
Labor Relations Counsel,

RICHARD BERMAN,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,

LAWRENCE D. EHRLICH,
JERRY KRONENBERG,
HOWARD L. MOCERF,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
BOROVSKY, EHRLICH &
KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603.

Supreme Court, U.S.
FILED
MAR 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,
Petitioner,
—v.—
CORNING GLASS WORKS, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,
—v.—
PETER J. BRENNAN, Secretary of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

RUTH BADER GINSBURG
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

KENNETH M. DAVIDSON
State University of New York at Buffalo, School of Law
John Lord O'Brian Hall
North Campus
Buffalo, N. Y. 14250

Attorneys for Amici Curiae

INDEX

	PAGE
Motion for Leave to File Brief *Amici Curiae*	2
Brief *Amici Curiae*	6
Interest of *Amici*	6
Statement of the Cases	6
Summary of Argument	6
ARGUMENT:	
I. Where two jobs receiving different pay are found equal, the Equal Pay Act requires pay equalization by raising the lower wage to equal the higher	7
II. Corning's 1969 introduction of a base wage rate did not equalize wages since the "male" premium was preserved for persons then working as inspectors on the night shift	9
III. Consistent with the dominant intent of Congress to eliminate sex-based wage differentials, time of work under the Equal Pay Act should be considered a wage "factor other than sex" rather than a non-"similar working condition"	13
IV. Even if time of work is considered a "working condition" the Equal Pay Act remains applicable to the wage differential challenged in the instant cases	16

PAGE

A. The Third Circuit failed to consider the consistency of its holding with the purpose of the Equal Pay Act 16

B. The structure and purpose of the Equal Pay Act indicate that the Secretary established a prima facie violation in these actions 18

C. The Secretary's proof was sufficient to support a determination that Corning's "male" premium for night inspectors was unjustified under the Equal Pay Act 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases:

Brennan v. City Stores, 479 F.2d 235 (5th Cir. 1973) 18, 19, 21

Brennan v. Robert Hall, 473 F.2d 589 (3d Cir.), *cert. denied*, 94 S. Ct. 50 (1973) 21

Griggs v. Duke Power, 401 U.S. 424 (1971) 23

Hodgson v. Baltimore Regional Joint Board, 462 F.2d 180 (4th Cir. 1972) 13

Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), *reversed in part*, 445 F.2d 823 (8th Cir. 1971) 18, 19

Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972) 10

PAGE

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) 23

Shultz v. American Can Co., 424 F.2d 356 (8th Cir. 1970) 11

Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970) 18, 19, 20, 21

Federal Statutes:

29 U.S.C. §206(d)(1) 6, 8, 17

29 U.S.C. §206(d)(2) 13

42 U.S.C. §2000e 8, 20

Federal Regulations:

29 C.F.R. §800.145 (1971) 7, 13, 22

29 C.F.R. §800.146 (1971) 10

Other Authorities:

Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U. L. Rev. 326 (1971) 18

Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615 (1970) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

—v.—

CORNING GLASS WORKS, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,

Petitioner,

—v.—

PETER J. BRENNAN, Secretary of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief *amici curiae*. Counsel for the petitioner in *Brennan* v. *Corning Glass Works*, #73-695, and for the respondent in *Corning Glass Works* v. *Brennan*, #73-29, have consented to the filing of this brief; counsel for the respondent in *Brennan* v. *Corning Glass Works, supra,* and for the petitioner in *Corning Glass Works* v. *Brennan, supra,* have refused consent.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus,* American Civil Liberties Union, believes that these cases concerning the rights of working women pose a legal issue of great significance to the achievement of full equality under the law between the sexes. At stake in these cases is the effectiveness of the Equal Pay Act in eradicating discrimination in pay based solely on sex.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving gender discrimination in employment. We acted as *amici curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), which involved automatic dependency benefits for the wives of servicemen, while servicewomen were required to prove that their husbands were dependent on them for more than half their support before they could qualify. This sex-based differential in employment benefits was held by this Court to constitute invidious discrimination in violation of the

fifth amendment. We also acted as *amici curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur*, 42 U.S.L.W. 4186 (Jan. 22, 1974), in which the ACLU argued that regulations terminating the employment of public school teachers or requiring them to take unpaid leaves of absence before and after childbirth were unconstitutional. This Court held that regulations of the kind imposed by the Chesterfield County School Board and the Cleveland Board of Education violated the due process clause of the fourteenth amendment. Lawyers for the American Civil Liberties Union were counsel in *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947 (1972), judgment vacated and remanded for consideration of mootness when the Air Force waived Captain Struck's discharge shortly after her brief was filed. The Brief for Petitioner in *Struck*, filed with this Court on December 8, 1972, discussed in detail the issues raised by the involuntary discharge of pregnant military officers, in particular, and of pregnant gainfully employed women, in general. With regard to the general problem of sex-based discrimination, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971).

The National Organization for Women is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000, with over 500 chapters throughout the United States. Its membership consists of large numbers of working women who are immediately affected by the Equal Pay Act.

NOW, since its inception, has sought enforcement of the Equal Pay Act as part of its efforts to achieve economic and employment gains for women. Basic to these efforts is the securing of equal pay for equal work for all women. The decision of this Court will have significant impact on large numbers of working women, including many members of NOW.

The purpose of this brief is to argue that a claim under the Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206(d)(1), may not be barred at the threshold merely because it involves comparison of a job performed during the day and that same job performed at night. It is the position of *amici* that time of work is not a "working condition" as that term is used in the Equal Pay Act, and that even if time of work does constitute a "working condition," sex-based pay differentials of the kind here involved remain within the ambit of the Act. The brief develops that while time of work may constitute a valid basis for a wage differential under the Act, pay disparities that happen to fall along shift lines, but are occasioned by sex discrimination rather than time of work, fall squarely within the core concern of Congress declared and implemented in the Equal Pay Act.

RUTH BADER GINSBURG
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016
Attorney for Movants

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

—v.—

CORNING GLASS WORKS, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,

Petitioner,

—v.—

PETER J. BRENNAN, Secretary of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* appears in the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioner in *Brennan* v. *Corning Glass Works*, #73-695, 480 F.2d 1254 (3d Cir. 1973), and by Respondent in *Corning Glass Works* v. *Brennan*, #73-29, 474 F.2d 226 (2d Cir. 1973).

Summary of Argument

The principal argument developed by *amici* is that a claim under the Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206 (d)(1), may not be barred at the threshold merely because it involves comparison of a job performed during the day and that same job performed at night. Corning Glass Works ("Corning") has asserted a number of defenses in these actions in addition to the defense based on time of work; *amici* has addressed these other defenses first, to demonstrate that the only substantial issue before this Court is whether the Equal Pay Act permits Corning to perpetuate a "male" wage premium, which happens to fall along shift lines, but is unrelated to time of work. Thus the first two

points in the argument of *amici* ignore, for most purposes, the fact that inspection work is performed at night as well as by day; the argument initially developed is that (1) apart from the time factor, the Equal Pay Act clearly requires Corning to pay a uniform base wage rate to both men and women employed as inspectors, and (2) the uniform rate must be the "male" rate. *Amici* then argues that the legislative purpose and structure of the Equal Pay Act require that an action not be precluded solely on the ground that the action compares persons working during the day with persons working at night.

ARGUMENT

I.

Where two jobs receiving different pay are found equal, the Equal Pay Act requires pay equalization by raising the lower wage to equal the higher.

The work performed by the day and night inspectors at the Corning Glass plants is "equal work."[1] All courts that have considered this issue, both district courts and the United States Court of Appeals for the Second Circuit, have made findings to that effect. The study commissioned by Corning accords with this conclusion. Moreover, the Corning management apparently recognized that the work performed is equal when it established a uniform base rate in January 1969 for day and night inspectors.

[1] The effect of the time at which work is performed is considered under Points III and IV. For purposes of Points I and II it is sufficient to note that both *amici* and the Secretary of Labor concede that night work may constitute a valid basis for a wage differential. See 29 C.F.R. §800.145 (1971).

Corning maintains that it complied with the Act when in 1966 it permitted women to earn as much as men by becoming night inspectors. Had this case involved an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and were the day and night jobs considered to be different, opening the night jobs to women would have been an essential step toward an adequate response. But the work performed by the inspectors has been established to be equal, not different, and the Equal Pay Act requires that the wages paid to both day and night workers also be equal (apart from any genuine night shift differential).

Corning's reliance on the proviso to 29 U.S.C. §206(d)(1) which forbids "only" *lowering* wages to equalize pay (and according to Corning's argument does not require *raising* wages) is misplaced. The body of §206(d)(1) requires that wages be equalized. To equalize wages without lowering anyone's pay means that one sex's wages must be raised to the current level of the other's. The rationale for "equalizing up" is explicit in the statement of purpose supplied by Congress and implicit in its decision to place the Equal Pay Act within the Fair Labor Standards Act, 52 Stat. 1060 (1938). The Equal Pay Act Declaration of Purpose, Act of June 10, 1963, Pub. L. No. 88-38 §2, recording congressional findings and policy, indicates a legislative determination that wage differentials between the sexes for equal work exist because of the economic inability of one sex to resist exploitation. The remedy Congress provided was to require the employer to pay the employees the difference between the wages they receive at the exploitation rate and what they would have received had they

been paid a fair market rate, that is, had they been members of the opposite sex. The remedy is not to provide new employment opportunity; it is simply to end sex-based exploitation in wages. Thus Congress deemed it appropriate to equate the position of the lower paid sex with those who lacked bargaining strength to demand even the minimum wage, and to treat the differential in pay between the sexes as unpaid minimum wages. Under the Fair Labor Standards Act, an employer cannot justify having paid or perpetuating a depressed sex-based wage rate any more than he can justify having paid or continuing to pay a wage rate below the statutory minimum.

II.

Corning's 1969 introduction of a base wage rate did not equalize wages since the "male" premium was preserved for persons then working as inspectors on the night shift.

If the 1969 uniform wage rates had been instituted in 1966 it would have been clear that either equalization was not achieved or it was achieved by lowering the pay accorded males. The following hypothetical, using simplified wage rates, illustrates the point.

Wage Rates Prior to Equalization		Wage Rates After Equalization	
Women's Rate	$1.50	Women's Rate	$1.75
Men's Rate	$2.50	Men's Rate ..... (already hired)	$2.75
		Men's Rate ..... (newly hired)	$1.75

While no person's wages have been reduced (indeed the hypothetical wage rate for women has been increased), all women continue performing equal work at a rate less than that paid all men until the first new man is hired. Nor is retention of the higher wage rate for already hired men justifiable under Labor Department regulations as a "red circle" rate, for the regulations specifically preclude red circle status "where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work . . . . To allow this would only continue the inequities which the Act was intended to cure." 29 C.F.R. §800.146 (1971). Moreover, the rate paid newly hired males does not terminate sex-based wage depression. See *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226-27 (7th Cir. 1972). Rather, it perpetuates a depressed rate for females and may exacerbate the situation by spreading disadvantageous treatment to men whose personal situation diminishes their job market opportunities.

The actions of Corning differ from the hypothetical case set out above in two respects: (1) when the rates were "equalized" some women were receiving the "male" rate because "equalization" was introduced after women became eligible to apply for night work; (2) when the wages were "equalized" in 1969 the new uniform rate was in excess of the 1966 "male" rate although less than the 1969 "male" rate. Neither of these differences establishes compliance with the Equal Pay Act.

The fact that some women are being paid at the "male" rate does not alter the sex-based character of the rate. See *Miller Brewing, supra,* 457 F.2d at 227. As noted in Point I, the Equal Pay Act was initially violated at Corning

plants because women were paid a lower rate for performing equal work. At that point it became the obligation of the employer to equalize the rates, which opening up the "male" rate classification to some women does not do. See *Shultz* v. *American Can Co.*, 424 F.2d 356, 359 (8th Cir. 1970). The higher rate does not cease to be a "male" rate until equalization is achieved, that is, until no woman inspector is paid the lower rate. If this were not so, employers could avoid all back pay liability under the Equal Pay Act by: reclassifying one woman to the male rate; establishing a new uniform rate equal to the former female rate; and red circling the wage rate of all male employees and the one lucky woman.

While Corning does not urge that the Act can be circumvented in the manner just described, it has suggested that because the 1969 "equalization" rate was higher than the 1966 "male" rate, its obligations under the Act are satisfied. So long as the sex-based differential is perpetuated, however, raising the female rate to the level of the former male rate does not achieve equalization. The 1969 elevation of the female rate may reflect no more than inflation. In any event, to allow that raise as a defense would transform an unlawful delay in taking steps towards achieving equalization into a method of complying with the Act. Moreover, an elevated female rate that remains below the current "male" rate fails to reflect the fair market rate that Congress presumed was represented in the "male" rate.

Further indicating that Corning's course of action perpetuated and even spread sex-based wage depression is the improbability that the 1969 uniform rate could have been imposed had it encompassed male inspectors then work-

ing on the night shift. Inclusion of these male inspectors almost certainly would have engendered formidable resistence. The male employees not subject to a generally discriminatory labor market are in a better position to assert their demands and, through concerted action, could make it difficult for Corning to do without them. By segregating employees who have the bargaining power to demand a fair wage, a company may gradually assemble a work force of persons whose personal situation or characteristics impel them to accept depressed wages. When the employees receiving the "male" rate are completely phased out, the employer will have transformed a competitive wage into a depressed rate in an orderly, rather than disruptive, manner due to the time afforded by gradual phase-out of the "male" wage rate. The end result may be that the jobs are held only by those who encounter discrimination in the labor market. By contrast, if Corning is required to raise all wages to the new "male" rate the jobs would continue to be attractive to those with more marketable personal characteristics, persons equipped to resist lowering wages to an exploitation level.

Corning has asserted that equalizing up to the "male" rate entails a heavy cost. That is both true and irrelevant. When exploitation ceases and fair value is paid the cost is always greater, but cost factors do not excuse an employer from paying the minimum wage, nor do they excuse wage exploitation of women.

Finally, Corning asserts that judicial alteration of the collective bargaining agreement will disrupt industrial relations. Where, as here, that agreement perpetuates unlawful discrimination the agreement is no defense. Con-

gress has specifically forbidden labor organizations to foster such discrimination, 29 U.S.C. §206(d)(2), and the courts have held them liable under the Equal Pay Act. See, e.g., *Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972).

III.

Consistent with the dominant intent of Congress to eliminate sex-based wage differentials, time of work under the Equal Pay Act should be considered a wage "factor other than sex" rather than a non-"similar working condition".

Both parties and the Courts of Appeals for the Second and Third Circuits agree that time of work may constitute a valid basis for a wage differential. See 29 C.F.R. §800.145 (1971). These cases do not involve that issue. The actions brought by the Secretary of Labor against Corning Glass are based solely on a premium paid over and above the shift differential. As Chief Judge Friendly said below:

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. 474 F.2d at 233.

The issue in these cases is whether pay differentials which happen to fall along shift lines, but are attributable to sex discrimination rather than time of work, may be attacked as violations of the Equal Pay Act.

The Third Circuit concluded that time of work constitutes a "working condition"; it further concluded that this characterization placed Corning's wage pattern beyond the pale of the Equal Pay Act. 480 F.2d at 1261. The Second Circuit ranked time of work as a factor that did not exclude application of the Equal Pay Act, but recognized that shift differentials could be defended under the Act if "based on any other factor other than sex." Chief Judge Friendly, writing for the Second Circuit, observed that the term "working condition" has an accepted technical meaning in industrial relations which apparently does not include time of work. 474 F.2d at 231-32. He also noted that Corning's internal job evaluation reports do not treat time of work as a "working condition" and that in congressional hearings on the Equal Pay Act concerning "working conditions," neither the representative of Corning Glass nor representatives of other industries mentioned time of work as a "working condition." *Ibid.* He therefore concluded that Congress did not intend time of work to be defined as a working condition. Judge Adams, writing for the Third Circuit, reached the opposite conclusion relying primarily upon a syntactic analysis of a statement on the floor of the House of Representatives. 480 F.2d at 1260.

These different characterizations of time of work assumed pivotal importance because Judge Adams and Chief Judge Friendly agreed that if time of work constituted a "working condition," then the jobs at Corning would not be comparable under the Equal Pay Act unless the Secretary of Labor could prove that night is day. The position of the Third Circuit, that even blatant sex-based wage discrimination is immune from challenge under the Act if

the sexes work on different shifts, would create a coverage gap of potentially enormous proportion. For example, an employer would have no Equal Pay Act problems if he put women to work from midnight to 8 a.m., and from 8 a.m. to 4 p.m. at a rate of two dollars an hour, and hired men for the 4 p.m. to midnight shift at a rate of four dollars an hour. Or the employer might transfer women from the day shift to the evening shift, retaining their pay rate at two dollars an hour, and men from the evening shift to the day shift, retaining their pay rate at four dollars an hour. These are extreme examples, but they are no more improbable than the contention of Corning that Congress did not mean to outlaw such discrimination. If the Second and Third Circuits are correct in their view of the effect of classifying time of work as a "working condition," then the Second Circuit must be correct that shift differentials rank as an exception to the Act only to the extent that the employer establishes they are "based on any other factor other than sex."

IV.

Even if time of work is considered a "working condition" the Equal Pay Act remains applicable to the wage differential challenged in the instant cases.

A. *The Third Circuit failed to consider the consistency of its holding with the purpose of the Equal Pay Act.*

In the concluding portion of his opinion for the Third Circuit, Judge Adams stated:

> Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. 480 F.2d at 1261.

If Judge Adams meant only that he and the members of his panel resisted the temptation to decide the case on the basis of their personal preferences, the statement would be unexceptionable. But examination of the opinion suggests that he may have meant something more—that the purpose of the Act should not be considered in determining the meaning of particular statutory words because public policy is too difficult to discern from legislative history. Yet Judge Adams plunged into the quagmire to locate a definition for "working condition." His search disclosed a definition of these words in isolation from the general context of the statute. Judge Adams then embraced that definition without pausing to consider its consistency with the dominant purpose of the legislation.

Even if Judge Adams correctly labelled the time factor a "working condition," however, it was incumbent upon him, before disposing of the case, to consider the values Congress balanced when it enacted the Equal Pay Act. The opinion does not do that. Much space is devoted to the court's location of a definition for "working condition," but the effect of the definition selected on the outcome of the case is decided in a single sentence quoted from the district court opinion:

> Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not "very much alike" or "alike in substance or essentials." 480 F.2d at 1261.

At no point does the opinion consider whether the Congress that passed the Equal Pay Act rationally could have intended to insulate blatant sex-based wage differentials from attack so long as the differential falls along shift lines. The court avoided this inquiry, apparently fearing that it might lead to judicial hypothecation of policy from delphic legislative history. But the policy at issue here is not at all obscure; beyond question, Congress desired to outlaw sex-based wage differentials for equal work. Equal Pay Act of 1963, 77 Stat. 56, §2(b). And if the abuse charged falls squarely within the core concern of Congress, the statute must be construed to secure termination of the abuse.

B. *The structure and purpose of the Equal Pay Act indicate that the Secretary established a prima facie violation in these actions.*

Corning's argument ultimately rests on the proposition that a single difference in working conditions precludes wage comparison of otherwise identical jobs under the Equal Pay Act. But the notion that any difference bars the Secretary from establishing a prima facie case has been almost uniformly rejected with respect to the functionally similar issue of what constitutes "equal work." See Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U. L. Rev. 326, 339-41 (1971).

From the inception of the Equal Pay Act, courts have agreed that plaintiffs must demonstrate a sex-based pay differential in jobs that require "equal skill, effort and responsibility" performed under "similar working conditions"; until the plaintiff discharges this burden, the defendant need not justify his conduct. Nevertheless, commencing with the earliest appellate decisions, courts have held plaintiff's burden satisfied despite obvious differences in the jobs performed by each sex. For example, in *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), the court held that even assuming the sexes performed different work for as much as 18% of their work day, a claim under the Equal Pay Act was well founded. Similar determinations were made in *Brennan* v. *City Stores*, 479 F.2d 235 (5th Cir. 1973) (wage comparison between males who sold, marked and fitted men's clothes, and females who sold, marked and fitted women's and children's clothes), and in *Hodgson* v. *Daisy Mfg. Co.*, 317 F. Supp. 538 (W.D. Ark. 1970), *reversed in part for failure*

to award prejudgment interest, 445 F.2d 823 (8th Cir. 1971) (women processed many small items; men, heavier items, fewer in number). In these cases, the courts relied both on congressional choice of the word equal (rather than the word identical) as a modifier of the word work, see, e.g., *Shultz* v. *Wheaton Glass Co., supra,* 421 F.2d at 265, and on the broad aims proclaimed in the statute and by its sponsors. *Id.* at 265-66.

As is apparent from these decisions, the judiciary has resisted employer arguments focused on work variations that, if accepted, would have undermined the effectiveness of the Equal Pay Act. At the same time, courts have eschewed exploration into employer motivations for establishing work differences. For a motivation-centered approach would have embroiled them in determining as a matter of fact in each case an issue that does not lend itself to resolution through direct, objective evidence. Moreover, a finding of nondiscriminatory motivation for establishing a work difference could not serve as a complete defense if the Act is to be applied in a manner consistent with the congressional decision to modify the word "work" by "equal" instead of "identical." Thus, courts have relied on objective proof of work similarities but have not held plaintiffs to a standard of work identity. Of course, the corridor was not opened wide for wage comparison of dissimilar jobs. In *City Stores, supra,* where different fashions were handled by male and female employees, the court required the Secretary to show a "congruence" of skills as an essential element of his case. 479 F.2d at 239. In *Daisy Mfg., supra,* where the women worked on lighter items, it was the Secretary's burden to show that the higher volume and greater mental exertion demanded of the women required at least as much effort. 317 F. Supp.

at 544. And in *Wheaton Glass, supra,* the Secretary established that at least 82% of the work was identical. 421 F.2d at 263.

The reasons for the approach taken with respect to "equal work" apply with the same force to "similar working conditions." For the very same risks of undermining the Act are entailed in a rigidly restrictive proof requirement concerning working conditions. As already illustrated, time of work, even entire shifts, can be manipulated to achieve sex-based wage discrimination. Indeed, if, as Corning has argued, the work time must be identical, less elaborate schemes would suffice to insulate an employer's wage discrimination from Equal Pay Act scrutiny. For example, a wage differential could be preserved for the favored sex simply by extending the work day for that sex by a quarter of an hour.

In sum, in view of the potential for crippling the Equal Pay Act inherent in allowing differences in time of work to block any application of the Act, the Secretary must be held to have established a prima facie case where, as here, he has shown the sex-based character of the wage differential and an overall congruence of the requirements of the job. In this manner, differentials in fact attributable to time of work could be preserved, but sex-based differentials would be eliminated.[2]

---

[2] The obligation of the judiciary to construe the Equal Pay Act in light of congressional purpose cannot be brushed aside by pointing to the potential of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as a weapon against sex discrimination in employment. Congress hardly intended to dilute legislation that has as its special and exclusive focus gender-based wage depression when it added sex to the Title VII catalogue. In addition to the different central thrust of the two Acts (Title VII is designed primarily to open job opportunities to groups that once faced closed doors), the

C. *The Secretary's proof was sufficient to support a determination that Corning's "male" premium for night inspectors was unjustified under the Equal Pay Act.*

Case law noted in the preceding section has established that apparent work differences between wage classifications do not preclude equal pay review. To avoid liability under the Act, employers must show that the wage classification is related to the work difference. Thus, while the bald argument that time of work makes the wage classifications noncomparable should not succeed, an employer may justify a shift differential by showing that it is in fact attributable to time of work rather than to the sex of employees who perform the work.

In each of the cases noted earlier it was open to the employer to show that the work difference justified the pay differential. For example, in *Wheaton Glass, supra,* the employer's liability would have been avoided or diminished by proof that the time men worked at tasks different from those performed by women yielded greater economic gain to the company than the time spent at tasks performed by both sexes. See 421 F.2d at 266-67. And in *Brennan* v. *Robert Hall,* 473 F.2d 589 (3d Cir.), *cert. denied,* 94 S. Ct. 50 (1973), a case similar to *City Stores, supra,* a successful defense was predicated on the greater profit to the employer produced by sale of men's clothing.

Defenses of the same kind are available to an employer whose pay differentials turn on time of work. It is generally recognized that night work entails inconveniences for an employee in a world in which most people work by day. Thus, the Secretary's regulations recognize the

---

Equal Pay Act has unique features, for example, anonymous complaints, that make it attractive to persons who might be reluctant to pursue a claim under Title VII.

legitimacy of a differential for night work. See 29 C.F.R. §800.145 (1971). In exceptional cases an employer might even be justified in paying persons on the day shift a wage higher than the one paid to persons of the opposite sex who work the evening shift. For example, a bar owner might pay day employees higher wages, recognizing that bar personnel prefer to work evenings when tips are higher.

When an employer establishes that some differential is justified under the Act, it may be that the Secretary must then carry the burden of showing that the differential involved in the particular case is excessive. But where no attempt is made by the employer to justify any differential, the court must conclude that the Act has been violated.

That is the situation in the cases before this Court. The "male" premium (the amount above the base rate and the night shift differential) paid to "red circled" night inspectors cannot seriously be argued to be a night shift differential. If it were it would be paid to all night inspectors and would probably bear some relation to night shift differentials for other jobs at the plant. If the premium represented compensation for inconvenience to the employees or benefit to the company, Corning could justify at least part of the pay differential between those who receive the "male" premium and those who do not. See Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615, 629-31 (1970). But no justification at all has been urged, nor could one be formulated, because the premium is simply the current incarnation of the male rate of pay for night inspectors; thus Corning should be held liable for paying unequal wages for equal work performed under similar circumstances.

CONCLUSION

In construing Title VII of the Civil Rights Act of 1964 this Court has rejected arguments that would have sapped the Act of vitality. For example, in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971), the Court held that even though the company's policy affected only women with pre-school children, the policy entailed sex-based discrimination and could be justified only on grounds specified in the Act. And in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court rejected a reading of the Act that would have required plaintiff to prove defendant's motivation; instead the Court held sufficient plaintiff's proof that defendant's practice caused disproportionate numbers of black employees to be eliminated from consideration for promotion. In those cases, as in this one, the legislation provided a fair basis for the protection of legitimate employer interests. In those cases, as in this one, the arguments pressed by employers exposed the congressional design to the risk of destruction.

For the reasons stated above *amici* urge the Court to safeguard the effectiveness of the Equal Pay Act by affirming the judgment of the Court of Appeals for the Second Circuit and reversing the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

KENNETH M. DAVIDSON
State University of New York at Buffalo, School of Law
John Lord O'Brian Hall
North Campus
Buffalo, N. Y. 14250

Attorneys for Amici Curiae

March, 1974

FILE COPY

FILED
MAR 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OBJECTION OF CORNING GLASS WORKS TO "MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*"

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
EDWARD N. STONER II,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON---SR. REPRESENTATIVE
HAROLD L. BERKOBEN---REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15237
412-881-7469

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OBJECTION OF CORNING GLASS WORKS TO "MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*"

Amici **have not satisfied the provisions of Supreme Court Rule 42(3) which require that they state the facts or questions of law involved in these cases that have not been, or will not adequately be, presented by the parties.**

Supreme Court Rule 42(3), "Briefs of an Amicus Curiae," provides, in relevant part, that when consent for filing such a brief is refused by a party the *amicus* may file a motion for leave to file and shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case . . . ."

Neither the American Civil Liberties Union ("ACLU") nor the National Organization for Women ("NOW") has claimed in their motion for leave to file a brief *amici curiae* that the Solicitor General of the United States, as attorney for the Secretary of Labor, will not adequately present the facts or questions of law involved in these cases. Moreover, counsel for the ACLU specifically admitted to counsel for Corning that it could not be claimed that the parties would not adequately present the facts or legal questions.

We have withheld consent to the filing of the brief by the *amici* because the parties will adequately present the facts and legal questions. Moreover, we feared that a brief hurriedly prepared by *amici* would contain errors which would create confusion if not corrected by reply brief or in oral argument. We believe that this case is sufficiently complex without permitting further complication and confusion to be created by the fact that *amici* have had insufficient time to become adequately familiar with the case.

Neither the ACLU nor NOW participated in the trials or court of appeals review of the cases now before this Court. Their unfamiliarity with these cases is evidenced by the lack of a single citation in their brief to the appendices and their reliance upon "hypotheticals" which distort the facts.

Our concern that the presentation by *amici* will confuse rather than clarify the issues presented for this Court's review is illustrated by the problem that the brief of *amici* contains serious (although no doubt inadvertent) misstatements of facts.

The first paragraph of the second argument contained in the brief of *amici*[1] states:

> "If the 1969 uniform wage rates had been instituted in 1966 it would have been clear that either equalization was not achieved or it was achieved by lowering the pay accorded males. The following hypothetical, using simplified wage rates, illustrates the point.

Wage Rates Prior to Equalization		Wage Rates After Equalization	
Women's Rate	$1.50	Women's Rate	$1.75
Men's Rate	$2.50	Men's Rate ..... (already hired)	$2.75
		Men's Rate ..... (newly hired)	$1.75"

The chart set forth by *amici* is, by its terms, a hypothetical and *amici* admit the chart differs from the facts of these cases in at least two respects.[2] However, the chart does not merely "differ from the facts." The chart is misleading in the following ways:

(a) *Amici* state, in the sentence preceding the chart, "[i]f the 1969 uniform wage rates had been instituted in 1966 it would have been clear that . . . [equalization] was achieved by lowering the pay accorded males." According to the chart, pay for males was reduced from $2.50 to $1.75 for newly hired males. However, *amici* admit, a page

[1] Brief for ACLU and NOW as *Amici Curiae* at 9.

[2] *Id.* at 10.

later in their brief, "when the wages were 'equalized' in 1969 the new uniform rate was in excess of the 1966 'male' rate . . . ."[3] Thus, although the chart shows a reduction of 75 cents per hour, the fact is that wage rates were increased.

(b) The left column of the chart shows a differential of $1.00 between the "Women's Rate" of $1.50 and the "Men's Rate" of $2.50 prior to equalization. The brief of *amici* does not state that this data is misleading. In fact, however, the maximum base wage rate differential between day inspectors and night inspectors never exceeded 19.5 cents hourly through 1967,[4] and, prior to January, 1969, was only 20.5 cents hourly for Class B[5] and 17 cents hourly for Class C Inspectors.[6] The misleading nature of the terms "Women's" and "Men's" rates is discussed in (d) *infra*.

(c) The right column of the chart shows a differential of $1.00 between the "Women's Rate" of $1.75 and the "Men's" Rate" of $2.75 after January, 1969. The brief of *amici* does not state that this data is misleading. In addition to the misleading nature of the terms "Women's" and "Men's" rates discussed in (d) *infra*, the figures bear no relationship to the facts. After January, 1969 there was a uniform job evaluated rate which was the same for all three shifts.[7] A "red circle" provision in the January, 1969, agreement provided that every person who had been employed on any job in the plant on the effective date of the

---

[3] *Id.*

[4] App. (2d Cir.) 38-40.

[5] App. (2d Cir.) 183 n.4. General TV Inspectors were paid at approximately the same wage rate as the Class B Inspectors. App. (2d Cir.) 175 (Answer No. 2 in Pl. Ex. 101).

[6] App. (2d Cir.) 183 n.4.

[7] App. (2d Cir.) 183.

agreement would receive a rate higher than the job evaluated rate when he or she worked the inspection night shift.[8] Further, the differential between the job evaluated rate and the "red circle" rate attacked by the Secretary of Labor was not $1.00 an hour but rather 4 cents an hour (Class C Inspectors), or 12 cents an hour (Class B Inspectors).[9]

(d) The chart is also misleading because it characterizes the wage rates as "Women's Rates" and "Men's Rates." The record shows that every inspector who had been working on the day shift on June 1, 1966, when the night shift jobs were opened to women, had the opportunity to transfer to the higher paying night shift by June 20, 1966,[10] long prior to the 1969 time frame of the chart.

Thus, prior to and after January 20, 1969, the night shift rate and the day shift rate were paid to both men and women and not exclusively to one sex, as the chart indicates.[11]

These examples emphasize that *amici* lack the familiarity with the facts of these cases to adequately deal with the questions of law which arise from these facts. More importantly, the examples point out the potential for confusion of the issues which could result from allowing the participation of these *amici*.

The problem of correcting misleading statements of *amici* is made extremely difficult by the fact that the Solicitor General has not, as of the date of this writing, served its brief in this case upon Corning even though that brief was due no later than Monday, March 4, and oral argument is scheduled for March 25, 1974.

---

[8] App. (2d Cir.) 183-84.

[9] App. (2d Cir.) 183 n.4.

[10] Brief for Corning Glass Works at 39 n.63b.

[11] Brief for Corning Glass Works at 10 n.25.

Conclusion

For the foregoing reasons, we respectfuly submit that the motion of the American Civil Liberties Union and National Organization of Women, Legal Defense and Education Fund, for leave to file a brief *amici curiae* should be denied.

Respectfully submitted.

SCOTT F. ZIMMERMAN,
WALTER P. DeFOREST III,
EDWARD N. STONER II,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

March 13, 1974.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

CERTIFICATE OF SERVICE OF OBJECTION OF CORNING GLASS WORKS TO THE "MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*"

I, Scott F. Zimmerman, attorney for Corning Glass Works, petitioner in No. 73-29 herein and respondent in No. 73-695 herein, as a member of the Bar of the Supreme Court of the United States, hereby certify that, pursuant

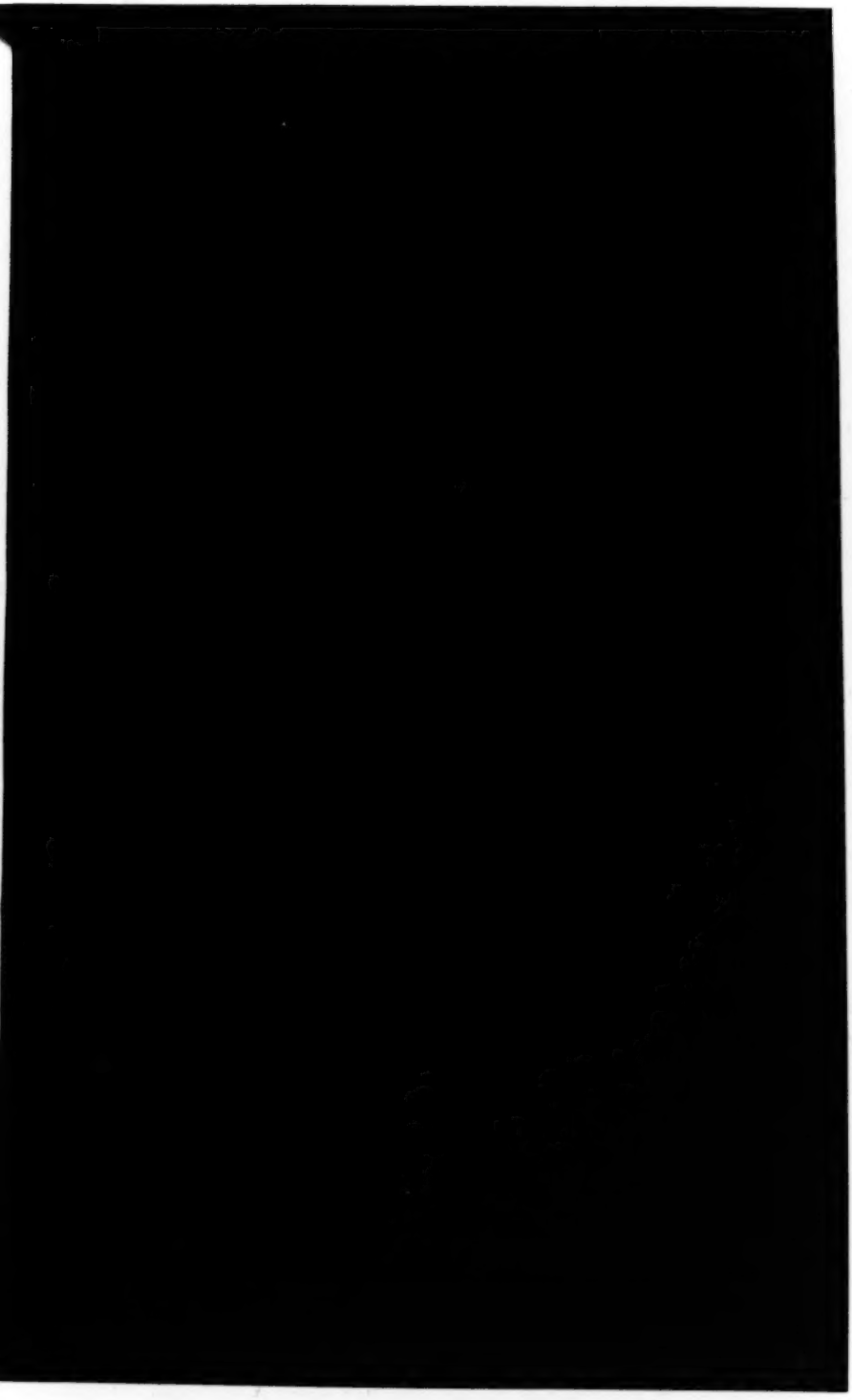
to Rule 33 of this Court, on the 14th day of March, 1974, service was made of a copy of the Objection of Corning Glass Works to the "Motion of American Civil Liberties Union and National Organization for Women, Legal Defense and Education Fund, For Leave to File Brief *Amici Curiae*" by mailing said copy in an addressed envelope, with first class postage prepaid, to (1) the Solicitor General, Department of Justice, Washington, D. C. 20530, (2) Ruth Bader Ginsburg and Melvin L. Wulf, American Civil Liberties Union, 22 East 40th Street, New York, N. Y. 10016, and (3) Kenneth M. Davidson, State University of New York at Buffalo, School of Law, John Lord O'Brian Hall, North Campus, Buffalo, N. Y. 14250.

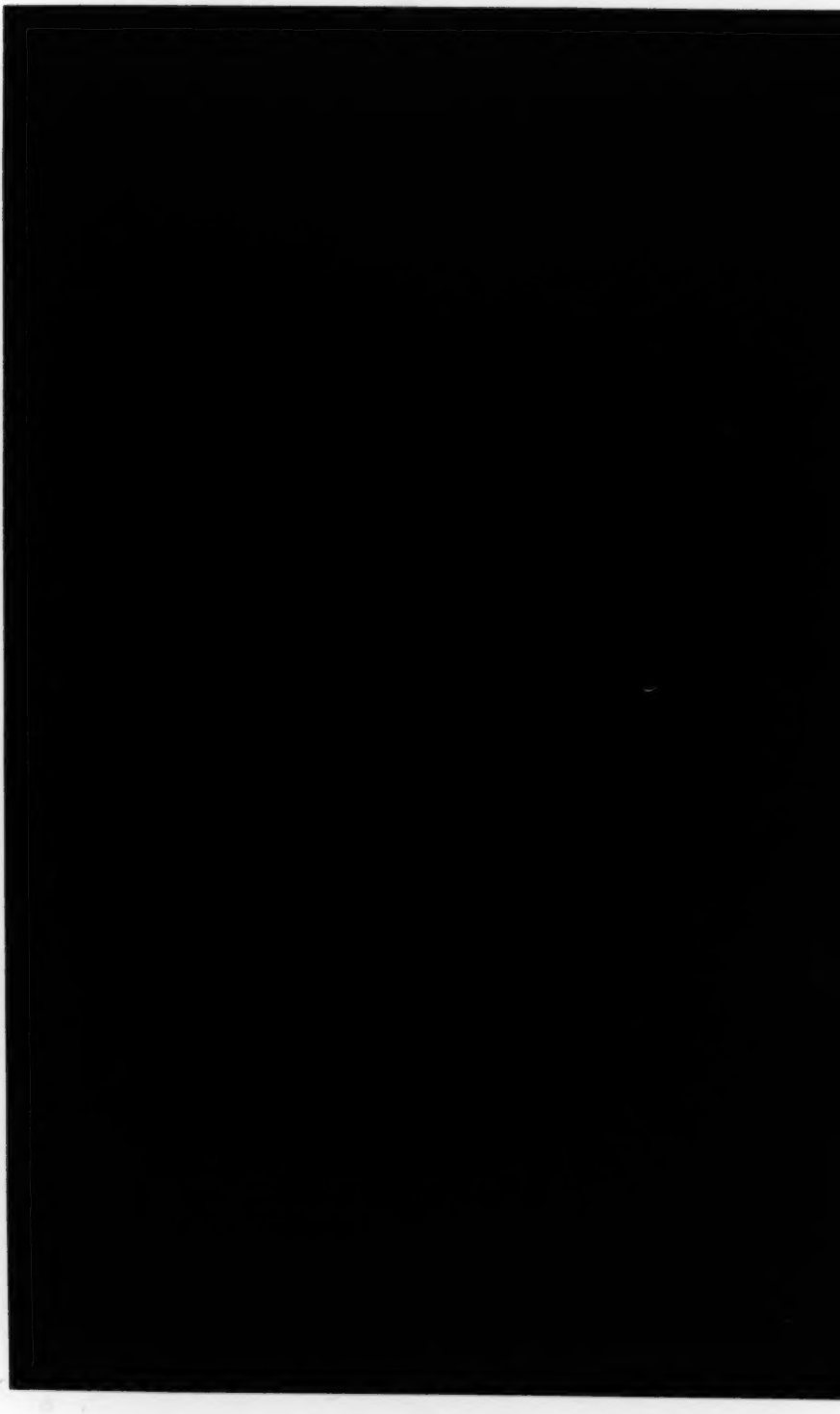
I further certify that all parties required to be served have been served

SCOTT F. ZIMMERMAN,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Attorney for Corning Glass Works, Petitioner in 73-29 and Respondent in 73-695.

Dated: March 14, 1974.





INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	5
Summary of argument	18
Argument:	
I. The Equal Pay Act forbids the paying of a higher base wage rate, in addition to a shift differential, to induce men to do "female work" at night	21
A. The term "working conditions" does not refer to the time of day when jobs are performed but to their "physical surroundings" and "hazards"	25
B. Even if time of day worked is a "working condition" within the meaning of the Act, differences in shift, where separately compensated, do not make otherwise equal jobs unequal	32
II. The equal pay violations were not cured when Corning, without raising the discriminatory female inspector rates, opened up its male jobs to women and its female jobs to men	35
III. The equal pay violations were not cured when Corning established equal rates for inspection jobs on all three shifts, but simultaneously set new higher "red circle" rates for night shift inspectors then employed	43
Conclusion	45

534-486—74——1

CITATIONS

Cases:

	Page
Alexander v. *Gardner-Denver Co.*, No. 72–5847, decided February 19, 1974	42
Armstrong Co. v. *Nu-Enamel Corp.*, 305 U.S. 315	35
Brooklyn Savings v. *O'Neil*, 324 U.S. 697	42
Cheng Fan Kwok v. *Immigration Service*, 392 U.S. 206	31
Griggs v. *Duke Power Co.*, 401 U.S. 424	44
Haggar Co. v. *Helvering*, 308 U.S. 389	35
Hodgson v. *Brookhaven General Hospital*, 436 F. 2d 719	23, 33
Hodgson v. *Daisy Manufacturing Company*, 445 F. 2d 823, affirming *per curiam* 317 F. Supp. 538	23
Hodgson v. *Miller Brewing Co.*, 457 F. 2d 221	34, 36, 40
Hodgson v. *Square D Company*, 459 F. 2d 805	36
Robinson v. *Lorillard Corp.*, 444 F. 2d. 791, certiorari dismissed, 404 U.S. 1006	44
Schulte, Inc. v. *Gangi*, 328 U.S. 108	42
Shultz v. *American Can Co.–Dixie Products*, 424 F. 2d 356 certiorari denied, 398 U.S. 905	23, 36, 40
Shultz v. *Wheaton Glass Co.*, 421 F. 2d 259, certiorari denied, 398 U.S. 905	23
United States v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534	35
United States v. *Bethlehem Steel Corp.*, 446 F. 2d 652	44
United States v. *Katz*, 271 U.S. 354	35
Wirtz v. *Basic Incorporated*, 256 F. Supp. 786	34
Wirtz v. *Dennison Manufacturing Company*, 265 F. Supp. 787	34

Statutes and regulation:

	Page
Equal Pay Act of 1963, 77 Stat. 56, 57, 29 U.S.C. 206:	
Section 2(a)	4, 37
Section 3	3, 5
Section 4	12, 41
Fair Labor Standards Act of 1938, C. 676, 52 Stat. 1060, *et seq.*, as amended, 29 U.S.C. 201, *et seq.*:	
Sec. 6(d), 29 U.S.C. 206(d)	2, 3, 5, 37, 41, 42
N.Y. Labor Law § 173 (McKinney, 1965)	13
29 C.F.R. 800.145	22

Miscellaneous:

Belcher, *Wage and Salary Administration* (1955)	31
XXI Cong. Q. No. 24 (1963)	37
108 Cong. Rec. 14751–14752	42
108 Cong. Rec. 14765–14766	40
108 Cong. Rec. 14771	40
108 Cong. Rec. 14773	40
109 Cong. Rec. 2714	38
109 Cong. Rec. 4899	28
109 Cong. Rec. 6210	28
109 Cong. Rec. 8914	33
109 Cong. Rec. 8915	38, 41
109 Cong. Rec. 9195	28
109 Cong. Rec. 9196	29, 37
109 Cong. Rec. 9197	28
109 Cong. Rec. 9198	42
109 Cong. Rec. 9199	41, 42
109 Cong. Rec. 9203	41
109 Cong. Rec. 9205–9206	30
109 Cong. Rec. 9207	41
109 Cong. Rec. 9209	29, 42
109 Cong. Rec. 9210	20, 27, 29, 37, 41

Miscellaneous—Continued Page

109 Cong. Rec. 9211 ---------- 27

Dictionary of Occupational Titles, The, Vol. II (3d ed., 1965) ---------- 31

Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. ---------- 25, 26, 27, 41

Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S. 910, 88th Cong., 1st Sess. ---------- 25–26, 41

H.R. 11677, 87th Cong., 2d Sess. ---------- 40

H.R. 3861, 88th Cong., 1st Sess. ---------- 25, 40, 41

H.R. 5605, 88th Cong., 1st Sess. ---------- 28, 34

H.R. 5110, 88th Cong., 1st Sess. ---------- 28

H.R. 6060, 88th Cong., 1st Sess. ---------- 27, 28, 40

H. Rept. No. 309, 88th Cong., 1st Sess. ---- 20, 27, 37, 41

S. 882, 88th Cong., 1st Sess. ---------- 25

S. 910, 88th Cong., 1st Sess. ---------- 26

S. Rep. No. 176, 88th Cong., 1st Sess. ---------- 33, 38

United States Civil Service Commission, *Job Grading System for Trades and Labor Occupations* (FPM Supp. 512–1) ---------- 32

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-29

CORNING GLASS WORKS, A CORPORATION, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

No. 73-695

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

CORNING GLASS WORKS, A CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE THIRD CIRCUITS

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (2d Cir. App. 195-215)[1] is reported at 474 F. 2d 226. The opinions of the District Court for the Western District of New York are reported at 319

[1] "2d Cir. App." refers to the printed appendix in No. 73-29, and "3d Cir. App." refers to the printed appendix in No. 73-695. "J.A. (2d Cir.)" and "J.A. (3d Cir.)" refer to the parties' joint appendices in the respective courts of appeals.

F. Supp. 1161 (2d Cir. App. 145–167) and 330 F. Supp. 46 (2d Cir. App. 180–190).

The opinion of the Court of Appeals for the Third Circuit (3d Cir. App. 195–208) is reported at 480 F. 2d 1254. The opinion and supplemental findings of the District Court for the Middle District of Pennsylvania (3d Cir. App. 175–193) are reported at 341 F. Supp. 18.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 2, 1973 (2d Cir. App. 216–217). Corning's petition for a writ of certiorari in No. 73–29 was granted on December 17, 1973, and the case was ordered consolidated with No. 73–695 (2d Cir. App. 217).

The judgment of the Court of Appeals for the Third Circuit was entered on June 28, 1973 (3d Cir. App. 209). The government's petition for a writ of certiorari in No. 73–695 was granted on December 17, 1973, and the case was ordered consolidated with No. 73–29 (3d Cir. App. 210).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1), prohibit an employer from paying a higher base wage to male night shift inspectors performing the same work as female inspectors on the day shifts, where the wage differential (1) was adopted to induce men to perform

"female work" and (2) is paid in addition to a night shift bonus which is paid to all employees, regardless of sex, for night work.

2. Whether Corning cured any prior equal pay violations in its New York plant in June 1966, when without raising the lower wage rates paid to its women (day shift) inspectors, it began to allow women to work on the night shift at the higher male rates, while at the same time allowing men to work on the day shifts at the lower female rates.

3. Whether Corning cured any equal pay violations in its New York plant in January 1969, when it established equal wage rates for inspectors on the day and night shifts, but at the same time raised the rates for the night shift inspectors then employed to a still higher level and "red circled" those rates, thereby continuing the differentials that had previously existed between day and night shift inspectors.

STATUTE INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal

> work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Other pertinent provisions of the Equal Pay Act of 1963 include the Congressional findings contained in Section 2(a) of the Act and that part of Section 3 which amended the Fair Labor Standards Act of 1938 by adding to it Section 6(d)(2).

Section 2(a) of the Equal Pay Act of 1963, 77 Stat. 56, provides:

> The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.

Section 6(d)(2) of the Fair Labor Standards of 1938, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 57, 29 U.S.C. 206(d)(2), provides:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

STATEMENT

These actions were brought by the Secretary of Labor in the United States District Courts for the Western District of New York and the Middle District of Pennsylvania to enjoin Corning Glass Works ("Corning") from paying lower wages to women inspectors employed at its plants in Corning, New York (No. 73–29) and Wellsboro, Pennsylvania (No. 73–695),[2] than it paid to men performing the same work, excluding wage differences attributable to contractual shift differentials. The Secretary alleged that the wage differential discriminated against women inspectors on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), and sought to restrain Corning from further violations of the Act and from withholding back pay due to women inspectors because of past violations.

[2] A third case involving Corning and the same pay practices is currently pending in Rhode Island, Civil Action No. 4036.

534-486—74——2

Until June 1, 1966 (in New York) and until October 16, 1966 (in Pennsylvania) Corning employed only women as inspectors during the day shifts and only men to do such work at night (except during World War II) (2d Cir. App. 150, 151; 3d Cir. App. 176). When the practice of employing men inspectors at night was instituted, Corning did not pay shift differentials (*ibid.*) and the men in all other job classifications were paid the same base wages, regardless of shift (2d Cir. App. 198, n. 3; 3d Cir. App. 184–185). Nonetheless, Corning historically paid its men inspectors a higher base wage than it paid to women inspectors. When Corning adopted a plant-wide shift differential to be paid to all employees working at night, that differential was added to the higher base wage paid to men inspectors (2d Cir. App. 151; 3d Cir. App. 184).

Corning denied that its concededly unequal wage rates were subject to the equal pay provisions of the Fair Labor Standards Act, claiming that otherwise identical work performed at night and during the day is not "performed under similar working conditions" within the meaning of the Equal Pay Act, and that the Act is therefore inapplicable to its wage policies, however discriminatory they may be. Alternatively Corning argued that, if the inspection work on the day and night shifts was found to be equal, full compliance with the Act was achieved either in 1966, when Corning opened job vacancies on the night shift to women, or in January 1969, when Corning established equal wage rates for inspectors on all shifts, but at the same time raised the rates for the night

shift inspectors then employed to a still higher level and "red circled" those rates.[3]

Each of Corning's contentions was rejected by both the District Court for the Western District of New York and the Court of Appeals for the Second Circuit in No. 73–29. In No. 73–695, however, the District Court for the Middle District of Pennsylvania and the Court of Appeals for the Third Circuit sustained Corning's argument that the Equal Pay Act was inapplicable to its wage policies, because night and day work are not "performed under similar working conditions." Those courts did not pass on Corning's other defenses.[4]

1. Prior to 1925, the only inspectors employed by Corning were women who worked on both the day and the afternoon shifts. These women were paid individual wage rates which ranged from 20 to 30 cents per hour (2d Cir. App. 101–103). In that year, Corning started automating its plants for around-the-clock production. It therefore became necessary to

[3] Corning also claimed that the night shift inspectors exerted greater effort than the day and afternoon inspectors, and further, referring to one inspector classification at the Pennsylvania plant, that the men in that particular classification exercised greater responsibility. Contrary to Corning's statement that the "effort" issue was not dealt with by the Second Circuit (Corning Br., p. 15), that court, after referring to the district court's findings on the issue, specifically held that the effort exerted by the night shift inspectors in performing their own utility work constituted such an "inconsequential difference" that it did not render the jobs unequal (2d Cir. App. 208–209).

[4] The District Court for the Middle District of Pennsylvania did, however, enter supplemental factual findings with respect to those contentions (3d Cir. App. 182–193).

have inspectors on all three shifts (2d Cir. App. 37; 3d Cir. App. 28). Since Pennsylvania and New York law both prohibited the employment of women after midnight, Corning had to employ men as night shift inspectors (2d Cir. App. 37; 3d Cir. App. 29). The record in the New York case (No. 73–29) indicates that most of these men came from blowing rooms where the lowest wage rate was 48 cents per hour (2d Cir. App. 108–109). As night shift inspectors these men received 53 cents per hour. This higher wage for men was explained by Corning's Manager of Statistics and Surveys, Mr. McKibbin, as follows (2d Cir. App. 108):

> Q. You state * * * that the inspection worker enjoyed less prestige than other activities on the night shift. Was it dirtier work? A. No, I think it was considered to be female work.

Later, in explaining the increase, Mr. McKibbin mentioned the loss of incentive pay which the men could earn in the blowing room, then added (2d Cir. App. 109):

> [T]he increase in their base rate was necessary to encourage them to take this demeaning work.
>
> Q. Demeaning because it was women? A. In their judgment, it was demeaning.

Accordingly, the district court in the New York case concluded that "in order to obtain male employees willing to perform what was regarded by the male employees as female work, [Corning] had to pay the male employees a higher rate than it paid female employees who performed inspection work on the day and afternoon shifts" (2d Cir. App. 150). As the

parties stipulated: "When male inspectors were first assigned to the steady night shift, hiring rates were determined by what an employer had to pay to fill his needs in the community market place" (3d Cir. App. 28). And, as one of Corning's witnesses candidly admitted, the men "just wouldn't work at the women's rate" (2d Cir. App. 116, 119). The male inspectors were therefore paid a higher rate even though the company was not paying extra compensation for night work at that time, since all "male only" jobs carried the same base rate regardless of shift (2d Cir. App. 198, n. 3; 3d Cir. App. 184–185).

Corning did not pay shift differentials until it was organized by a union in 1944 and required to do so by a collective bargaining agreement.[5] The first contract made no changes in Corning's existing base rate schedules (including those established for men and women inspectors) (2d Cir. App. 39; 3d Cir. App. 30) but it did require Corning to develop an equitable wage rate plan for all job classifications (3d Cir. App. 74, 124). Pursuant to this provision, Corning adopted a job classification system developed by its consultants Stevenson, Jordan and Harrison, the "SJ&H plan" (2d Cir. App. 45–46; 3d Cir. App. 74). The SJ&H plan described and evaluated the inspector jobs on the basis of "general schooling," "training period," "manual skill," "versatility," "job knowledge,"

[5] The 1944 union contract established shift differentials of 3 cents per hour for employees on the nonrotating afternoon shift and 5 cents per hour for those on the nonrotating night shift (2d Cir. App. 40; 3d Cir. App. 31). These differentials, the validity of which is not challenged by the Secretary, have since been increased to 10 and 16 cents per hour (2d Cir. App. 176; 3d Cir. App. 31).

"responsibility," and "working conditions" (2d Cir. App. 100; 3d Cir. App. 69). Under this evaluation, the inspector jobs, regardless of shift, were found to be equal in all respects, including "working conditions" (2d Cir. App. 45; 3d Cir. App. 69), which were defined by the SJ&H plan as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the[ir] duties" (Exh. J. to Pltf's Exh. 1 in No. 73–695; 2d Cir. App. 61, 63, 66, 98–99).

Despite this equal evaluation, the women inspectors continued to receive lower base rates than the men since the SJ&H plan established separate male and female rate schedules which differed from each other even though the jobs had been assigned the same number of evaluation points.*

These differentials between men and women inspectors were maintained, not only in each succeeding union contract (2d Cir. App. 39, 124–125; 3d Cir. App. 76), but also after Corning re-evaluated the jobs under the Corning Glass Works (CGW) plan in 1963 and 1964 (2d Cir. App. 39, 75, 79, 83, 87; 3d Cir. App.

---

* Thus in October 1947, the women inspectors at the Pennsylvania plant, whose job evaluation points ranged from 250 to 415, were paid maximum rates between $0.915 and $1.035 per hour whereas men inspectors, whose job evaluation points also ranged from 250 to 415, were paid maximum rates $1.105 and $1.255 per hour (3d Cir. App. 69, 173–174). Not only were the women inspectors paid less than the men inspectors, they were also paid less than even the hiker or utility workers whose job evaluation points were only 235 (*ibid.*).

65–66). The CGW plan, like the SJ&H plan, defined "working conditions" as the job's physical surroundings and hazards (2d Cir. App. 69–70, 74, 78, 82, 86, 91; 3d Cir. App. 65, 92–93); the definition did not include the time of day worked (2d Cir. App. 32–33, 65–67; 3d Cir. App. 65, 84). Also, like the SJ&H plan, the CGW re-evaluation found no significant differences in the duties performed by the men and women inspectors and awarded the same point values for skill, effort, responsibility and working conditions, regardless of shift (2d Cir. App. 45; 3d Cir. App. 66).

Thus, under both the SJ&H plan and the CGW plan, the greater burden of night work, like the greater burden of working on the afternoon shift from 2 p.m. to 10 p.m., was compensated by a shift differential, and not by varying the job evaluation of "working conditions." This was stated by Corning's expert witness, Dr. Paul Lehoczky (3d Cir. App. 93):

> Q. How do[es] [Corning] compensate employees for working at different times of day?
>
> A. They compensate them by a shift differential * * *.

Dr. Lehoczky added that "time of day worked" is "not [an element] carried in a job evaluation system" and that time or shift differences, like overtime work and work on Sundays, are considered a "wage condition" and not a "working condition" (3d Cir. App. 97). Corning's manager of job evaluations at its New York plant, Mr. Noble, similarly testified that time of day worked is not considered a working condition (2d Cir. App. 66–67; see also *id* at 69–71, 95, 98–99).

Following enactment of the Equal Pay Act, Corning distributed an intra-company memorandum to its plants which requested that they "make a comparison of female to male jobs" and identified as problem areas those "[p]lants using SJ&H Evaluation System Discriminatory Wage Schedules" (2d Cir. App. 128–130; 3d Cir. App. 61). Despite this memorandum, Corning did not raise the wage rates of its women inspectors, but instead (within a day or two days of the date the Act became applicable to the particular plants)[7] merged the separate "male" and "female" wage schedules into a single wage schedule (2d Cir. App. 153; 3d Cir. App. 190). This single schedule, rather than correcting the discriminatory wages, preserved exactly the same differentials that had previously existed between the men and women inspectors by placing the women into lower labor grades on the revised schedule (2d Cir. App. 57–58, 110–115, 153; 3d Cir. App. 76–77, 133–134, 168–170, 190).

Later, in 1966, Corning merged its separate seniority lists for males and females (2d Cir. App. 19–20, 32, 43–44; 3d Cir. App. 29, 48–49), and since that

[7] The rate schedules were merged in New York effective June 11, 1964, the first effective date of the Act (2d Cir. App. 153). The merger of rate schedules in Pennsylvania took place on January 18, 1965 (3d Cir. App. 190). Corning apparently believed the Act became applicable to its Wellsboro, Pennsylvania, plant on January 20, 1965 (2d Cir. App. 129). However, since Corning's collective bargaining agreement for its Wellsboro plant was reopened on January 24, 1964 (J.A. (3d Cir.) 987), some seven months after enactment of the Equal Pay Act, that plant also became subject to the Act's requirements on June 11, 1964, by reason of Section 4 of the Act (77 Stat. 57).

time women, who had previously been restricted to the day and afternoon shifts, have been permitted to exercise their seniority to obtain jobs on the night shift (2d Cir. App. 43–44; 3d Cir. App. 38).[8] They were not, however, allowed to bump less senior men inspectors employed on the higher paying night shift. Instead, the women either had to fill out transfer requests and wait for vacancies in the case of non-bid jobs, or bid for jobs when they became vacant in the case of bid jobs (2d Cir. App. 43–44; 3d Cir. App. 49, 104, 190), and then remain on the new job for a period of 84 days (at least in Pennsylvania) before they could use their plant seniority to avoid dismissal in the event of a reduction of force (3d Cir. App. 77, 190).[9]

---

[8] Contrary to Corning's statement (Corning Br., p. 9), the New York law, as amended in 1953, contained no requirement that made union-management agreements a condition precedent for an employer to apply to the State Industrial Commissioner for permission to employ females over 21 years of age to work after midnight. All the Commissioner had to find was that "satisfatory conditions exist, including adequate transportation and safeguards for the protection of the health and welfare of the wom[e]n" (N.Y. Labor Law §§ 173(3)(a)(1) and (3)(e) (McKinney 1965)).

[9] Corning suggests (Corning Br., p. 10, n. 25) that these restrictions cannot have had any adverse effect on women really wanting to transfer to the night shift, pointing out that since its Pennsylvania plant had 395 inspector "openings" on its night shift during the years between 1966 and 1970, all of the women employed prior to that time could have had a night shift job. This statement ignores the fact that beginning in 1964, when Corning started mechanizing its operations, it has needed fewer and fewer inspectors. For example, the number of

The final change instituted by Corning occurred on January 20, 1969, when it abolished its separate base wage rates for the day and night shift inspectors and established the same wage rates for all three shifts (2d Cir. App. 19; 3d Cir. App. 53). At the same time, however, through the device of retroactive wage increases, Corning raised the rates for its night shift inspectors then employed to higher levels than those established under its new job evaluation plan and "red circled" these rates, thereby continuing the differentials that had previously existed between day and night inspectors (2d Cir. App. 168–170, 178–179; 3d Cir. App. 54–55).[10]

---

inspector-packer positions on the night shift has declined from 21 to 8, and the job of night-positioner-inspector has been eliminated altogether (3d Cir. App. 32, 79). In these circumstances, it is not surprising that the more senior women would not risk their job security by transferring to the night shift where, during the first 84 days, they could be bumped by night shift employees junior to them in plant seniority. Significantly, the junior employees identified by Corning as having obtained night shift jobs after October 1966 retained these jobs for only four weeks or less (3d Cir. App. 100, 121).

[10] The manner in which the "red circled" rates perpetuated the existing differentials may readily be seen when particular wage rates are examined. For example, at the Pennsylvania plant, the night shift quality inspectors, at the time of the January 20, 1969 agreement, were being paid $2.725 per hour (3d Cir. App. 163, 53–54). The quality inspectors on the day and afternoon shifts were being paid $2.49 per hour (3d Cir. App. 56, 163). The January 20, 1969 agreement established a single new "job evaluation" rate for quality inspectors on all three shifts of $2.79 per hour, or 6½ cents per hour more than the quality inspectors on the night shift and 30 cents per hour more than the quality inspectors on the day and afternoon shifts were then making (3d Cir. App. 53, 160). However, the agreement further provided for retroactive pay increases dating from November 4, 1968 (2d Cir. App. 177–179). Under this

2. *a.* The courts below in No. 73–29 concluded that Corning violated the equal pay provisions of the Fair Labor Standards Act by paying a higher base wage to men inspectors on the night shift performing the same work as women inspectors during the day, where the higher base wage was paid in addition to a regular night shift bonus. Those courts rejected Corning's contention that similar work performed at night and during the day was not within the Act's definition of equal work, because it was not work "performed under similar working conditions." In affirming the judgment of the district court, which had rejected this contention, the court of appeals (Friendly, C. J.) explained that while Corning's contention would seem to be true "[t]o those uninitiated in the language of industrial relations" (2d Cir. App. 202), it is clear from the "legislative history * * * that the time at which work is performed was not regarded as a 'working condition' but rather as a

provision, the rate for night shift quality inspectors was increased to $2.945 per hour and the day and afternoon shift rate was increased to $2.69 (3d Cir. App. 161). Since the retroactive wage rate for the day and afternoon shifts was still less than the new "job evaluation" rate, quality inspectors on those shifts received the new "job evaluation" rate of $2.79 per hour for the period following January 20, 1969 (3d Cir. App. 160); since, however, the retroactive wage rate for night shift quality inspectors was 15½ cents more than the new "job evaluation" rate, the higher retroactive rate was "red circled" (2d Cir. App. 177–179; 3d Cir. App. 53) and the difference between it and the new "job evaluation" rate was continued even after January 20 rate increases (2d Cir. App. 183). Under this arrangement, any employee with plant seniority as of or prior to January 20, 1969, who holds, or who subsequently takes, a job as inspector on the night shift receives the "red circle" rate (2d Cir. App. 177–179; 3d Cir. App. 54–55).

proper subject for 'a differential based on any other factor other than sex'" (2d Cir. App. 203). The court pointed out that the term "similar working conditions" was added to the Act's definition of "equal work" only after a Corning expert urged Congress to adopt the formulation used in most job classification systems, including Corning's, which "[u]nder 'working conditions' * * * listed two factors: 'surroundings' * * * and 'hazards'" (*ibid.*).

The courts in No. 73–29 also ruled that the higher base rates of Corning's men inspectors could not be justified under the "factor other than sex" exception. As the Second Circuit commented, "[t]he plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called 'female work.' This is the very condition at which the Equal Pay Act was aimed" (2d Cir. App. 207–208). The court of appeals also noted the lack of "evidence that any other night employees received higher pay than corresponding day workers until the plant-wide night differential was superimposed on the basic rates in 1944; since [which] time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work" (2d Cir. App. 207).

In direct conflict with these holdings, the courts below in No. 73–695 held the Equal Pay Act inapplicable to Corning's wage policies. The district court in No. 73–695 found that "except for the time of day worked, [the inspectors'] working conditions were the same," but concluded that a "given job performed at night

and at day is not performed under similar working conditions even though all other conditions are identical" (3d Cir. App. 180). The court, therefore, dismissed the Secretary's action without deciding any of Corning's other defenses. The Court of Appeals for the Third Circuit affirmed, on the basis of its reading of the Equal Pay Act's legislative history.

b. In No. 73–29, the courts below, having concluded that the jobs were equal and that the wage differentials could not be justified under the factor other than sex exception, next considered and rejected Corning's further contention that any equal pay violations on its part were cured when the night shift was opened to women. As the Court of Appeals for the Second Circuit explained, "Congress was quite specific * * * that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women" (2d Cir. App. 210). "In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *" (2d Cir. App. 211).

c. Although the district court in No. 73–29 initially agreed with Corning that it cured the equal pay violations when, by its January 20, 1969 agreement, it established equal wage rates for the inspectors on all three shifts, it reversed itself at a subsequent hearing and held that this agreement—which also established

a higher "red circle" rate for night shift inspectors hired before January 20, 1969—unlawfully "perpetuates the [prior] discrimination" (2d Cir. App. 187). The court of appeals agreed, pointing out that any night shift inspector hired before January 20, 1969, still "receives as basic pay rate * * * some four to twelve cents per hour higher than [the basic rate] for the day and afternoon shifts" (2d Cir. App. 212).

SUMMARY OF ARGUMENT

1. The Equal Pay Act, we submit, forbids an employer to pay a higher wage to men performing work at night which is the same as the work done by women during the day when that higher wage (1) was adopted to induce men to perform "female work" and (2) is paid in addition to the night shift differential. The differentials challenged here plainly had their origin in sex. As the Second Circuit observed below the "differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called 'female work'" (2d Cir. App. 207–208).

We stress that the Secretary of Labor has never questioned Corning's right to pay shift differentials to compensate employees who work undesirable night hours. But the differentials here at issue had nothing to do with the fact that men inspectors were working at night: at the time that they were adopted Corning did not pay a shift differential and, when such a differential was adopted, it was simply added on to the higher base wage already being paid to men.

In the courts below the principal dispute has been

over whether time of day worked is a "working condition" as that phrase is used in the Act's definition of equal work, or is a "factor other than sex" to be used by an employer as a matter of defense. Both courts below agreed that if the time of day worked was a "working condition" then the Equal Pay Act was inapplicable to Corning's practices, however discriminatory. The Third Circuit found that time of day worked was a "working condition," whereas the Second Circuit concluded that time of day worked was a "factor other than sex" which was separately compensated by the shift differential and which therefore did not justify the wage differences at issue here.

We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (2d Cir. App. 205) demonstrates that the statutory term "working condition" was used, as that term is used in job evaluation systems, to encompass only physical surroundings and hazards, and not time of day worked. The term was added to the Act's definition of equal work only after a Corning expert had urged Congress to expand its definition of equal work to include the factors found in most job evaluating systems: effort, skill, responsibility and working conditions. As used in those plans, working conditions comprise the subfactors of "surroundings" and "hazards."

We further believe that the Act applies in the circumstances of this case even if time of day worked is viewed as a "working condition." The sex-based discriminatory wages here involved are "the very condition at which the Equal Pay Act was aimed" (2d Cir. App. 208). These discriminatory wages do not become

lawful simply because the men being paid the higher wage work at night. As one of the courts below observed, the extra burden of night work "appears to have been taken care of by the fact that the men received * * * [a] differential for night work" (2d Cir. App. 162). Since the jobs are equal pay except for time of day worked and since that difference is in effect eliminated by the payment of shift differentials not in issue here, the jobs are equal under the Act.

2. Corning's contention that—assuming the jobs are equal—it cured prior violations of the Equal Pay Act when, without equalizing wages, it began to permit women to bid for jobs on the night shift, is without merit. The Act explicitly provides that an employer may not, in order to achieve compliance, "reduce the wage rate of any employee." The clear purpose of this *proviso* was to require the offending employer to equalize the wage rates without reducing the preferential higher wage, *i.e.*, to raise the lower wage. "The lower wage rate must be increased to the level of the higher" (H. Rep. No. 309, 88th Cong., 1st Sess, p. 3; 109 Cong. Rec. 9210). Plainly the vice of unequal pay for equal work was not cured by allowing some women to do the same work at night for higher base pay. The women remaining on the day shift still continued to do equal work for unequal pay. As the Second Circuit observed (2d Cir. App. 211): "Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential based (actually) on sex and still not justified by any other consideration * * *." Moreover, Corning also violated the no reduction *proviso* when it trans-

ferred certain men inspectors from the night shift to the day shift at a reduced rate wage level.

3. Corning's final contention that it cured any prior violations of the Equal Pay Act when it established equal rates for the inspector jobs on all three shifts, but at the same time retroactively increased the base rates for night shift inspectors, is similarly insubstantial. Had Corning equalized the rates for all three shifts it would have achieved compliance. However, at the same time, it provided retroactive pay increases dating back two months, which set higher rates for night shift inspectors than were established by the new uniform rates. Corning then "red circled" these retroactively established higher rates so that night shift inspectors then employed would continue to receive them even after the new uniform rates came into effect. As both courts in the New York case found, "the 'red circle' rate paid to night shift inspectors perpetuates the discrimination * * *" (2d Cir. App. 187, 212).

ARGUMENT

I

THE EQUAL PAY ACT FORBIDS THE PAYING OF A HIGHER BASE WAGE RATE, IN ADDITION TO A SHIFT DIFFERENTIAL, TO INDUCE MEN TO DO "FEMALE WORK" AT NIGHT

The wage differentials here at issue were based on sex. As Chief Judge Friendly stated for one of the courts below (2d Cir. App. 207–208):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors

to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed.

The wage differentials involved here did not reflect the fact that the higher-paid men inspectors worked at night. They began as an inducement to men to do "female work" and were simply added to the shift premiums when they were instituted in 1944. Since then, they have been carried forward in each collective bargaining agreement and exist today as the "red circle" rates for night shift workers employed prior to January 20, 1969.

The Secretary does not question Corning's right to pay additional wages to those of its employees who work undesirable night hours. Indeed, the Secretary's Interpretative Bulletin on the Equal Pay Act specifically recognizes the legitimacy of such differentials. See 29 C.F.R. 800.145. What the Secretary does challenge is Corning's right to maintain a wage differential which, although paid to certain employees working on the night shift, is completely unrelated to that fact, having its origin in sex, and is being paid *in addition* to the shift differential.

Neither the Second nor the Third Circuit questioned the propriety of maintaining shift differentials based upon the time of day worked. Both courts recognized, however, that the higher base wage paid to men inspectors for night work was not a shift differential, but was paid in addition to the shift differential (2d Cir. App. 198–199; 3d Cir. App. 198).

The courts differed, however, on whether the Equal Pay Act prohibits this discrimination in base wages

in the circumstances of these cases. Both courts started from the common premise that, if work performed at night and during the day was not work "performed under similar working conditions" within the meaning of the Act, then the Act did not reach the wage practices involved no matter how discriminatory and sex based they were. The Third Circuit concluded that the Act was "inapplicable" because "time of day worked is a 'working condition' within the meaning of the Equal Pay Act and not merely a 'factor other than sex' to be used by an employer as a matter of defense" (3d Cir. App. 207). The Second Circuit held, to the contrary, that time of day worked was not a "working condition," but a "factor other than sex" (2d Cir. App. 207). Since that court found that the greater burden of night work was separately and wholly compensated for by the contractual shift differential and that the work performed by the night shift inspectors did not otherwise differ significantly from the work of the inspectors on the other shifts,[11] the higher base wage for male inspectors on the night shift was not based on either a "factor other than sex" or a difference in "working conditions" and the Act was violated (2d Cir. App. 207–210).

We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (2d Cir. App.

[11] Minor and insignificant differences will not make jobs unequal for the purposes of the Act. *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (C.A. 5); *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356 (C.A. 8); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 264 (C.A. 3), certiorari denied, 398 U.S. 905; *Hodgson* v. *Daisy Manufacturing Company*, 445 F. 2d 823 (C.A. 8), affirming *per curiam* 317 F. Supp. 538, 551–552 (W.D. Ark.).

205) demonstrates that the statutory term "working conditions" was intended to encompass physical surroundings and hazards and not time of day worked (see pp. 25–32, *infra*.). However, we also believe that the Act applies in the peculiar circumstances of these cases under either reading of the statutory language. For even if "time of day worked" is considered a "working condition," the sex-based discriminatory wages involved here are forbidden by the Act. The statutory definition of equal work is not intended to remove from the Act's protection jobs which are substantially equal and whose differences are of a kind not usually considered for job evaluation purposes, are ignored when establishing wage rates as between employees of the same sex and are separately and independently compensated by a special differential geared to that difference. In these cases, time of day worked is a factor not considered in Corning's job evaluation programs and is ignored in fixing the base wage rates of Corning's men employees (since men in the noninspector jobs are all paid the same base rates regardless of their shift assignment). It is, moreover, a factor which can be and, in Corning's case, was separately and adequately provided for by a shift differential. Thus, regardless of whether "time of day worked" is a "working condition" or a "factor other than sex," the wage differential challenged here is not the one based on time of day worked (*i.e.*, the shift differential), but another separate and additional differential having its origins in considerations of sex (see pp. 32–35, *infra*).

A. THE TERM "WORKING CONDITIONS" DOES NOT REFER TO THE TIME OF DAY WHEN JOBS ARE PERFORMED BUT TO THEIR "PHYSICAL SURROUNDINGS" AND "HAZARDS"

Since Corning's job evaluation system has always treated the inspector jobs as equal, regardless of shift, these jobs are clearly equal within the meaning of the Act's equal work provisions, if the Act uses the term "working conditions" in the same sense that it is used in job evaluation plans. The Second Circuit's conclusion that the term "working conditions" was used in this technical way is strongly supported by the Act's legislative history. As originally introduced, the Act's equal pay requirement would have applied to "equal work on jobs the performance of which requires equal skills" (H.R. 3861, 88th Cong., 1st Sess.). During the hearings, however, Ezra G. Hester, Corning's director of industrial relations research, argued that this definition

> could give a great deal of difficulty to that large part of American industry and business which has relied upon the systematic methods of job evaluation for establishment of equitable rate relationships. Such job evaluation plans depend for their reliability upon other factors, than skill, alone. [Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 232 (hereafter House Hearings); Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S.

910, 88th Cong., 1st Sess. 97 (hereafter Senate Hearings).]

Mr. Hester urged the use of job classification systems in the Act's definition of equal work:

> With this general acceptance of job evaluation throughout industry on the part of both management and labor, we feel it most desirable that legislation related to the equal-pay principle incorporate in its language, recognition of job evaluation (or job classification) principles that have been developed, accepted, and are in general use. [House Hearings, p. 233; Senate Hearings, p. 97.] [12]

Mr. Hester described job evaluation systems as follows:

> Job evaluation is customarily made up of four major factors, of which skill is one. The four factors embrace those aspects of job worth that are always considered by people, the employees, and the union as being important. These are: Effort, skill, responsibility, and working conditions. [House Hearings, p. 233; Senate Hearings, p. 98.]

"Working conditions," Mr. Hester specifically informed the Labor Subcommittees, comprise two "subfactors": "surroundings" and "hazards." House Hearings, pp. 234–236; Senate Hearings, pp. 98–99.

Similarly, Mr. S. Herbert Unterberger (whose views were sought by Congressman Griffin because of his special "experience as a Government official respon-

[12] Also urging the acceptance of job classification systems in the definition of equal work was Corning's counsel, John W. Wayman, who testified at Congressman Goodell's "request." House Hearings, pp. 139, 152.

sible for the administration of a substantial part of the National War Labor Board's program") advised that "virtually all of the students and technicians in the field of job analysis and evaluation * * * are agreed that the four principal factors in determining the relative value of a job are skill, responsibility, effort and job conditions." House Hearings, pp. 304–305, 307–308.

In response to this and other testimony, the bill was rewritten to incorporate the industrial practice of using "job classification systems." Thus, as the House Report on H.R. 6060 states (H. Rept. No. 309, *supra,* at 3; 109 Cong. Rec. 9210):

> The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
>
> This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

The role of "job classification systems" was similarly explained in the minority members' Supplemental Views (H. Rep. No. 309, *supra,* at 8; 109 Cong. Rec. 9211):

> The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working con-

> ditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

See also, 109 Cong. Rec. 9195.

This, as the Second Circuit recognized, is compelling evidence that the drafters of the legislation intended that the "similar working conditions" language should have the same meaning as in industrial practice—as exemplified by Corning's own job evaluation plan (*supra*, pp. 10–11; see 2d Cir. App. 203–205).

While "[t]his persuasive explanation of how the bill took shape" formed the core of the Second Circuit's reasoning in striking down these discriminatory wages, it is ignored in the Third Circuit's opinion. Instead that court focused on a single statement of a single representative, Congressman Goodell. Although he was not the bill's sponsor,[13] Congressman Goodell, as part of a

[13] Although Congressman Goodell introduced two of the 20 equal pay bills introduced during the first session of the 88th Congress (H.R. 5110 and H.R. 5605), his bills were never debated and the bill which formed the basis of the Act (H.R. 6060) was the one sponsored by Congresswoman Green. Congressman Goodell did suggest that the bill be enacted as an amendment to the Fair Labor Standards Act and this suggestion was adopted (109 Cong. Rec. 9197). The statutory definition of equal work appears to have originated with the industry representative discussed above: Congressman Goodell's first bill (H.R. 5110) contained no mention of working conditions and his second bill (H.R. 5605) was not introduced until after Mr. Hester had testified on March 27, 1973. (Corning errs in stating that Congressman Goodell introduced H.R. 5605 on March 25, 1963 (Corning Br., p. 23, n. 49). He introduced H.R. 5110 on that date (109 Cong. Rec. 4899) and H.R. 5605 on April 10, 1963 (109 Cong. Rec. 6210)).

Nor is there any indication in the legislative history that Congressman Goodell was the spokesman for the House Labor Committee or that he had any special responsibility for explaining

general summary of the bill, expressed the view that "difference in shift * * * would logically fall within the working condition factor" (109 Cong. Rec. 9209). But such a generalized statement made on the floor by one Representative concerning the meaning of the phrase "working conditions"—which, as is apparent from the legislative history, was used as a term of art—should not take precedence over the technical meaning of the term.

The Third Circuit also disagreed with the Second Circuit's view that the House Report described shift differentials, not in terms of the statutory standard of "equal work," but as a "factor other than sex" (3d Cir. App. 204–205). The disputed language of the House Report reads as follows (109 Cong. Rec. 9210):

> The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
>
> * * * * *
>
> Three specific exemptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion ["a differential based on any other factor other than sex"] has been also included. Thus, among other things, shift

---

the bill's intent (Corning Br., p. 23). On the contrary, it was Congressman Thompson who, as Chairman of the Labor Subcommittee, summarized the Committee Report, and he did this before Congressman Goodell made any of his statements (109 Cong. Rec. 9196, 9209).

> differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. * * *

Although describing this language as "ambiguous," the Third Circuit found "no basic conflict between [it] * * * and Congressman Goodell's statements" (3d Cir. App. 205–206). Under its interpretation, examples listed in the House Report are not solely illustrations of exceptions under the "broad general exception" but rather "a chiaroscuro picture" of both the exceptions and the equal work requirements (3d Cir. App. 204). For example, the Third Circuit equated the example of "lifting or moving heavy objects" to the usual "effort" factor in the Act's equal work definition. The Committee's example, however, refers to "*restrictions on* or differences based on * * * [the] lifting or moving of heavy objects," and to "*restrictions on* or differences based on time of day worked, hours of work" (emphasis added).[14] Thus the reference may have been to State protective laws applicable to most women workers. See, *e.g.*, 109 Cong. Rec. 9205–9206. The Third Circuit also equated the example of "differences based on experience, training, or ability" to the "skill" factor. But, obviously, individuals of differing qualifications ("experience, training, or ability") may be assigned identical jobs requiring the same skills. And, since the House Report expressly states that all of the examples are

[14] The Third Circuit's quotation of the House Report inadvertently omitted the words "restrictions on or differences" (3d Cir. App. 203).

"differences" which "would * * * be excluded," the reference appears to be, not to the statutory definition of equal work, but to the exceptions specified in the statute—namely, the "[t]hree specific exemptions" of seniority, merit or the quantity or quality of production and the "one broad general exception" (factor other than sex). The need for these exceptions, in addition to the equal work definition, was emphasized by Mr. Hester, who stated that "individual rates of pay will lie within the rate range according to the individual's seniority and performance" (House Hearings, p. 233; Senate Hearings, p. 98).

In any event, whether the House Report is ambiguous, as the Third Circuit thought, or clear, as the Second Circuit concluded, there is no doubt as to the origin of the statutory term "similar working conditions"—an origin which seems to us to be of controlling weight in determining the congressional intent. The terms "working conditions," as the Second Circuit recognized, has a well defined meaning "in the language of industrial relations" which was specifically emphasized in the hearings; when "read in the way the experts would understand it," it refers to the physical surroundings and hazards of a job and not to the time of day during which the job is performed (2d Cir. App. 202–203).[13] Cf. *Cheng Fan Kwok* v. *Immigration Service*, 392 U.S. 206, 212.

[13] Job evaluation systems developed by the National Metal Trades Association, the National Electrical Manufacturers Association and the steel industry, all use the same definition of working conditions as the Corning Glass Works plan (Belcher, *Wage and Salary Administration*, pp. 271–274, 278, 287–289 (1955)). *The Dictionary of Occupational Titles*, vol. II, p. 656

The time of day worked, according to Corning's own expert witness, is not a working condition but a "wage condition" (*supra*, p. 11). It is thus a "factor other than sex" for purposes of the statute and justifies only that part of the wage differential which compensates the night shift employees for working undesirable hours (in this case the shift differential). The additional amount paid to night shift inspectors (the difference in base wages) constitutes an unlawful wage differential based on sex.

B. EVEN IF TIME OF DAY WORKED IS A "WORKING CONDITION" WITHIN THE MEANING OF THE ACT, DIFFERENCES IN SHIFT, WHERE SEPARATELY COMPENSATED, DO NOT MAKE OTHERWISE EQUAL JOBS UNEQUAL

Even if time of day worked is considered a "working condition" for purposes of the Equal Pay Act, the jobs involved here nonetheless are "equal work." The contrary holding of the Third Circuit rests, we believe, on an unduly narrow conception of the Act's basic purpose and consequent reach. As the Second Circuit succinctly explained (2d Cir. App. 207–208):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work."

(3d ed. 1965), United States Department of Labor, also defines working conditions as "the physical surroundings of a worker in a specific job," such as: "inside work v. outside work, exposure to heat, cold, wetness, humidity, noise, vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation." See also the United States Civil Service Commission's *Job Grading System for Trades and Labor Occupations*, FPM Supplement 512–1, p. A3–3, which has an almost identical definition of "working conditions."

> *This is the very condition at which the Equal Pay Act was aimed.* * * * [Emphasis added.]

It was the manifest purpose of the Act to eradicate sex based wage discriminations. To accomplish this end Congress developed a concept of equal pay for equal work (S. Rep. No. 176, 88th Cong., 1st Sess., 109 Cong. Rec. 8914). The Act defines equal work as "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." The key element of course is "equal work," and the language concerning "equal effort, skill and responsibility" and "similar working conditions" was obviously intended as a standard for determining what constitutes "equal work."

Here the difference in shift worked is a difference in what we are assuming to be "working conditions" which is not peculiar in any way to the inspectors, but similarly affects those on other jobs which are performed on all shifts. Moreover, it is a discrete difference for which all affected workers, including inspectors, receive discrete separate compensation by means of the payment of a plantwide shift differential. Since the asserted differences in "working conditions" thus has nothing to do with the base pay differential at issue, it does not serve to make otherwise equal work unequal. As the Court of Appeals for the Fifth Circuit observed in *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 723, n. 3:

> Under the [Equal Pay] Act, where pay is unequal, no dissimilarity in working conditions

> is relevant unless it somehow explains the pay differential. * * *

To put the matter another way, the shift difference is eliminated for purposes of the Act—or, in the statutory language, the shifts are made "similar"[16]—by payment of the shift differential. As the district court in No. 73–29 stated (quoting *Wirtz* v. *Dennison Manufacturing Company,* 265 F. Supp. 787, 790, n. 1 (D. Mass.)):

> "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work." This court is in accord that a differential such as the Corning-wide night differential adequately compensates employees for working undesirable times of day * * * [2d Cir. App. 162].

See also, *Hodgson* v. *Miller Brewing Company,* 457 F. 2d 221, 224–225, n. 8 (C.A. 7), where the court rejected the argument that women did not perform "equal" work since they were not allowed to work on the night shift, noting that "the 70 cents more at night was in addition to the shift differential of 10 to 16 cents an hour." And see *Wirtz* v. *Basic Incorporated,* 256 F. Supp. 786, 791 (D. Nev.).

In short, where jobs differ only in respect to a discrete condition or factor, such as time of day, which

[16] Significantly, the Act does not require that "working conditions" be "equal," but only that they be "similar." By contrast, the bill introduced by Congressman Goodell would have required "working conditions" to be "equal" (H.R. 5605, 88th Cong., 1st Sess.).

is separately and independently compensated by a differential geared to that condition and where the base rate of pay therefore reflects no difference in working conditions (however defined), the jobs are equal for purposes of the Equal Pay Act.

The holding of the Third Circuit that a single difference in the "working conditions" of otherwise identical jobs render the jobs unequal should therefore be rejected, even if support for it can be found in some statements in the legislative history. Our construction of the Act is obviously the one that is more consistent with the "policy of the legislation as a whole" (cf. *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333; *United States* v. *Katz*, 271 U.S. 354, 357), since it would otherwise be lawful under the Act (in some circumstances) to pay wage differentials which are based solely on sex—which is the very basis for differential payment that the Act was intended to prohibit.

II

THE EQUAL PAY VIOLATIONS WERE NOT CURED WHEN CORNING, WITHOUT RAISING THE DISCRIMINATORY FEMALE INSPECTOR RATES, OPENED UP ITS MALE JOBS TO WOMEN AND ITS FEMALE JOBS TO MEN

Corning contends (Corning Br., pp. 38–50) that—assuming the jobs to be equal—it cured any violations of the Equal Pay Act when, without equalizing the wage rates, it began to permit women to bid for jobs on the night shift as vacancies occurred. In rejecting this contention, the Second Circuit followed the hold-

ing of every other appellate court which has ruled on the issue.[17] See *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 359 (C.A. 8); *Hodgson* v. *Square D Company*, 459 F. 2d 805, 808–809 (C.A. 6); *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221, 226–227 (C.A. 7).[18]

As the Second Circuit stated (2d Cir. App. 210–211):

> Congress was quite specific how the injustice of unequal pay for equal work must be eradicated. * * * [I]t provided that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of women. * * *
>
> In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *.

This conclusion is supported by the language of the Act and all pertinent legislative history. The declared

---

[17] The Third Circuit, in No. 73–695, did not reach the question, because it held the Act "inapplicable" altogether (3d Cir. App. 207).

[18] Neither *Square D* nor *American Can Co.* can be distinguished on the basis, suggested by Corning (Corning Br., pp. 46–47), that "the women had not actually been able to transfer to [the male] jobs." Both rest instead on the principle that the women were entitled to the higher male rate for the work they were already performing, thus eliminating any need to transfer to the male jobs.

purpose of the Equal Pay Act was to correct "depress[ed] wages and living standards" caused by "wage differentials based on sex" (Section 2(a), 77 Stat. 56).[19] To achieve this end, the Act first prohibits unequal pay for equal work in the language we have discussed earlier, and then specifies (29 U.S.C. 206 (d)(1)):

> *Provided,* That an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

As was repeatedly emphasized in the legislative history, the purpose of this *proviso* was to require the offending employer to equalize the wages without reducing the preferential higher wage, *i.e.,* to raise the lower wage. Thus the House Report stated (H.Rep. No. 309, *supra,* at 3; 109 Cong. Rec. 9210): "The lower wage rate must be increased to the level of the higher." Similarly Congressman Thompson, the Chairman of the Labor Subcommittee, said during the House debates on the bill (109 Cong. Rec. 9196): "The lower wage rate must be increased to the higher level so that there will not be an adverse effect on already established wage patterns." And as Congresswoman Dwyer remarked, "The objective of equal pay legislation * * * is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases

[19] Note also the statement of President Kennedy, in signing the bill, that the measure was intended to provide "reasonable levels of income" to women workers (XXI Cong. Q. No. 24, p. 978, June 14, 1963).

where discrimination is still practiced" (109 Cong. Rec. 2714). See also S. Rep. No. 176, *supra;* 109 Cong. Rec. 8915.

Manifestly, the vice of unequal pay for equal work is not cured by allowing some—but not all—of those receiving a depressed wage to bid for an opportunity to do the same work at the higher wage. By hypothesis day and night inspection work are equal work; by statute, then, day and night inspectors must receive equal pay (except for shift differentials). It hardly satisfies the equal pay requirement to allow some day inspectors to work at night for higher pay: the rest of the day inspectors (as well as those brought in to replace the ones transferred to the night shift) are left doing equal work for unequal pay. As the Second Circuit correctly observed (2d Cir. App. 211); "Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *."

Corning's semantic argument (Corning Br., pp. 38–50) that "shall not * * * reduce" does not mean "shall increase" misses the point. While Corning did not reduce the wage rates for night work, neither did it equalize the pay for equal work as the main body of the Act requires. Thus we need not reach the issue whether Corning has complied with the no-reduction *proviso;* it did not comply with the core requirement of equal pay for equal work.

Moreover Corning errs in asserting (Corning Br., p. 40) that "[t]here was neither proof in the record nor

any finding by any of the courts below that any employee's wage rate had been reduced." The District Court for the Western District of New York found (2d Cir. App. 154, 181) that "since June, 1966, some men inspectors have taken day and afternoon inspection jobs with the reduced base hourly wage rate" and that "payment of a lower rate to the day and afternoon shift inspectors was sex-based and illegal, and that men as well as women were damaged momentarily when, after June 1, 1966, men worked at the previously all-female day and afternoon inspector jobs at a reduced base hourly wage rate." [20] Plainly, therefore, the maintenance of unequal rates for day and night inspection jobs not only continued the effect of past discrimination; it also resulted in reduced wage rates for the men transferred to the day and afternoon

[20] In response to written interrogatories, Corning listed the names of 54 men at its New York plant who accepted inspection jobs on the day or afternoon shift (2d Cir. App. 54–55). Although many of these men had not previously been employed as inspectors, seven of them came directly from one of the night shift inspector jobs. (These jobs are identified as No. 1377, night TV inspector, and No. 4671, night General TV inspector. See Pltf's Exh. 12, introduced at I Tr. 26 and admitted at II Tr. 253.) The seven men were G.A. Giannini, a General TV Inspector, who worked for five weeks on the day shift at $.195 less per hour than his night shift rate; W. R. Helms, a General TV Inspector, who worked for three weeks at a reduction of $.195 per hour; F. C. Morton, a General TV Inspector, who worked for six weeks at a reduction of $.195 per hour; D. E. Stabley, a General TV Inspector, who worked for less than one week at a reduction of $.195 per hour; D. P. Murphy, a TV Inspector, who worked for thirty-seven weeks at a reduction of $.085 per hour; B. T. Hoad, TV Inspector, who worked for seven weeks at a reduction of $.045 per hour; and R. L. Smith, a TV Inspector, who worked for twelve weeks at a reduction of $.045 per hour.

shifts in violation of the Act's provision against rate reduction. See *Shultz* v. *American Can Co., supra,* 424 F. 2d at 359; *Hodgson* v. *Miller Brewing Co., supra,* 457 F. 2d at 226.

In addition, as the Second Circuit noted, even after the night jobs were opened to women, virtually all the inspectors on the day and afternoon shifts were women so that "in effect Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially lower wage rate not justified by any factor other than sex" (2d Cir. App. 211). For example, in New York on June 2, 1968 only three of the 214 day and afternoon shift inspectors were men, and two of them had been in the job for one week and the third had been in the job for three weeks (Pltf.'s Exh. 12, computer printout, introduced I Tr. 26, admitted II Tr. 253).

Corning's argument that it was not required to raise the day wage rates to equal the night rates rests on an erroneous view of the effect of changes made in the bill following the subcommittee hearings. The bill originally considered by the subcommittee (H.R. 3861) was not, as Corning suggests (Corning Br., p. 44), more explicit than the later Green bill (H.R. 6060) in requiring that the lower wage rates be raised. Although H.R. 3861 would have established a procedure for the gradual upward adjustment of wages over a two-year period, it also called for conciliation and, like the bill which had passed the House in 1962,[21] did

[21] The 1962 bill, as originally introduced, prohibited rate reduction (H.R. 11677, Section 4, 87th Cong., 2d Sess., reprinted at 108 Cong. Rec. 14765–14766), but that language was deleted by an amendment offered by Congressman Goodell (108 Cong. Rec. 14771, 14773).

not specifically prohibit the lowering of wages.[22] The omission in H.R. 3861 of an absolute ban on reduction of wages to achieve equality was sharply criticized later in the hearings. See House Hearings, p. 115. To meet these objections, the bill which emerged from the hearings and became law contained an express *proviso* against rate reduction (29 U.S.C. 206(d)(1), *supra*, p. 37).[23] This *proviso*, as the House Report stressed, was intended to insure that "the lower wage rate[s] [would] be increased to the level of the higher" (H. Rep. No. 309, *supra*, at 3, 109 Cong. 9210).

Nor is there merit in Corning's claim (Corning Br., p. 48) that the decision below conflicts with the intent of "Congress * * * to afford maximum flexibility to free collective bargaining in adjusting rate relationships." While the Act does not interfere with matters which are the legitimate subjects of collective bargain-

[22] Thus when Congressman Griffin complained that H.R. 3861 would require "the lower wages to be raised to the higher" and that this might create an impossible economic hardship for some businesses (House Hearings, p. 65), Secretary of Labor Wirtz responded that "as administrator under the act," under the conciliation provisions of H.R. 3861, his "every disposition would be to accept * * * [a] mutually satisfactory arrangement" which would adjust wages to a livable level for the employer (House hearings, p. 65).

[23] In place of the provision permitting the gradual upward adjustment of wages, which was of great concern to employer groups (House Hearings, pp. 99, 136, 159–160, 193, 199, 241, 250–251, 278–279; Senate Hearings, p. 132), the bill delayed the effective date of the Act for at least one year, and, in the case of certain union contracts, for a period of two years (Section 4, 77 Stat. 57). See 109 Cong. Rec. 8915, 9199, 9203, 9207, 9210.

ing, it was recognized repeatedly during the debates on the equal pay provisions that unions may seek to enter into discriminatory agreements (109 Cong. Rec. 9198–9199, 9209; 108 Cong. Rec. 14751–14752). It was for this reason that Congress enacted Section 6(d)(2), 29 U.S.C. 206(d)(2), which specifically prohibits labor organizations from causing or attempting to cause an employer to discriminate in violation of the Act. The rights to equal pay for equal work, like other rights under the Fair Labor Standards Act, cannot be waived (*Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697; *Schulte, Inc.* v. *Gangi,* 328 U.S. 108). They are substantive rights created by federal legislation, which is not subject to repeal by means of the collective bargaining process. As the Court started this Term with respect to a similar question under Title VII of the Civil Rights Act of 1964 (*Alexander* v. *Gardner-Denver Co.,* No. 72–5847, decided February 19, 1974, slip op. 14–15):

> Title VII * * * concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. * * *

III

THE EQUAL PAY VIOLATIONS WERE NOT CURED WHEN CORNING ESTABLISHED EQUAL RATES FOR INSPECTION JOBS ON ALL THREE SHIFTS, BUT SIMULTANEOUSLY SET NEW HIGHER "RED CIRCLE" RATES FOR NIGHT SHIFT INSPECTORS THEN EMPLOYED

Corning finally contends (Corning Br., pp. 50–53) that it achieved compliance with the Equal Pay Act when, by a January 1969 collective bargaining agreement, Corning established a single "job evaluation" rate for each of its inspector jobs which was the same for all three shifts. We agree with the Second Circuit that "[i]f the agreement had stopped at that point, there could be no substantial claim of further violation of the Equal Pay Act" (2d Cir. App. 200).

However, Corning did not stop at that point; it also provided retroactive pay increases dating from November 4, 1968, which set rates for night shift inspectors that were higher than the new "job evaluation" rates for inspectors on all three shifts. Corning then "red circled" these retroactively established higher rates, so that night shift inspectors employed on the effective date of the January 1969 agreement would continue to receive them after the new "job evaluation" rates came into effect (2d Cir. App. 177; see p. 14, n. 10, *supra*).

In this manner the wage discrimination which existed prior to January 1969 (and which was by hypothesis illegal) was carried forward for the indefinite future. As both of the courts in the New York case found, "the 'red circle' rate paid to night shift inspec-

tors perpetuates the discrimination * * *" (2d Cir. App. 187, 212).

It is clear that the purpose and effect of the red circle rates is to continue a differential between the day and afternoon shift inspectors and the night shift inspectors, rather than to reward seniority as Corning suggests (Corning Br., p. 51). This is shown by the fact that the red circle rates do not follow night shift inspectors with seniority who transfer into day or afternoon shift inspector jobs, although the two jobs are by hypothesis equal (2d Cir. App. 184). Moreover, although the new uniform rates (rather than the higher red circle rates) are theoretically applicable to night shift inspectors hired after the effective date of the 1969 agreement, since that date, at least in New York, no one has been newly employed as a night shift inspector; nor is anyone likely to be for some time, since, as noted by the district court in No. 73–29, "there are about 500 employees currently on layoff who must be offered an inspection job before it can be offered to a new employee" (2d Cir. App. 184).

On these facts, the Second Circuit's holding that the 1969 agreement did not cure Corning's equal pay violations was correct and accords with the numerous decisions under Title VII striking down practices which, although "neutral on their face, and even neutral in terms of intent, * * * operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 659 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799, certiorari dismissed, 404 U.S. 1006.

CONCLUSION

The judgment of the court of appeals in No. 73–29 should be affirmed, and that of the court of appeals in No. 73–695 should be reversed.

ROBERT H. BORK,
Solicitor General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.
WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
SYLVIA S. ELLISON
HELEN W. JUDD,
Attorneys,
Department of Labor.

MARCH 1974.

534-486—74——7

U.S. GOVERNMENT PRINTING OFFICE: 1974

INDEX.

PAGE

I. The Act is inapplicable because work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the Act 3

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the Union making the steady night shift inspection jobs available to women without reducing any employee's wage rate..... 13

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded 18

IV. Conclusion 21

CITATIONS.

Cases:

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) 5

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 19

Hagger Co. v. Helvering, 308 U.S. 389 (1940)..... 5

Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970) 11

Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972) 11, 12

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971) 19

PAGE

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534 (1940) 5
United States v. Bethlehem Steel Co., 446 F.2d 652 (2nd Cir. 1971) 19
United States v. Katz, 271 U.S. 354 (1926) 5
Wirtz v. Basic Inc., 256 F.Supp. 786 (D.C. Nev. 1966) .11, 12

Statutes:

Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) .. 2, 3, 6, 13, 14, 18, 20
Fair Labor Standards Act of 1938 2
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 2, 11, 18

Miscellaneous:

109 CONG. REC. 8697 8
9195 2
9196 2
9197 ..... 2, 10
9198 (House, May 23, 1963) 2, 11

H.R. 3861, 88th Cong., 1st Sess. (1963) 15, 16, 17
H.R. 6060, 88th Cong., 1st Sess. (1963) 15, 17
Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor, 88th Cong., 1st Sess. (1963) .. 16

29 C.F.R. §§ 800.125-800.131 (1973) 8
§ 800.131 (1973) 8
§ 800.132 (1973) 8
§§ 800.2-800.3 (1973) 8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR CORNING GLASS WORKS

Because of the very severe time strictures placed upon preparation of this Reply Brief, we will be able to deal

with only the most serious errors in the Brief for the Secretary of Labor (hereinafter the "Secretary") to be filed by the Solicitor General of the United States.[1]

As a preface to any analysis of the Secretary's Brief, it is important to keep in mind that we are engaged in a case construing the meaning and application of the Equal Pay Act of 1963. 29 U.S.C. § 206(d)(1). We are not engaged in a case involving application of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* As appears on its face, the Equal Pay Act, unlike Title VII, is not a statute containing general prohibitions against sex discrimination in all terms and conditions of employment. The Equal Pay Act was intended by Congress, and drafted by Congress, to be a statute of limited application.[2] The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938. Like the minimum wage and overtime provisions in the Fair Labor Standards Act, the Equal Pay Act was intended to have a clear meaning to employers.[3]

---

[1] The Brief to which we are replying has not yet been served upon us in a final form. The Brief on behalf of the Secretary of Labor (hereinafter the "Secretary's Brief") was due on March 4, 1974. On March 14, 1974, we received a tentative draft of that Brief which was partially handwritten and partially typewritten. The argument in this case has been scheduled for March 25, 1974, and we have been advised by the Clerk of this Court that our Reply Brief must be filed no later than March 22, 1974. The citations in this Reply Brief are to a page proof copy of the Secretary's Brief which we have just received and which we are advised has been distributed to the Court. Accordingly, the citations in this Brief may be at variance from the pages which will ultimately appear in the Secretary's final printed Brief.

[2] 109 CONG. REC. 9195-96 (House, May 23, 1963) statement by Congressman Frelinghuysen. 109 CONG. REC. 9197-98 (House, May 23, 1963) statements by (in sequence) Congressmen Goodell, Griffin, Thompson. Supreme Court Brief of Corning Glass Works at Add. I, B-26-28 (hereinafter "Corning's Brief") (citations to "Add. ____" refer to Addenda to Corning's Brief).

[3] *Id.*

The Act was not intended to be interpreted or enforced merely wherever sex discrimination in employment might be alleged or even found to exist.[4]

The Equal Pay Act (hereinafter "the Act") should not be applied unless the explicit prerequisites to its application exist.[5]

I. The Act is inapplicable because work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the Act.

Corning Glass Works (hereinafter "Corning") argues, at 20-38 of its Brief, that work on a steady night shift is not performed under a similar working condition as work during the day within the meaning of the Equal Pay Act and that the Act has no application to the facts involved in these cases.

In regard to this issue the Second Circuit Court of Appeals concluded that work on a steady night shift was under a similar working condition as work during the day

---

[4] *Id.*

[5] The Equal Pay Act provides, in pertinent part, that:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ." Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1).

within the meaning of the Act.[6] We have analyzed what we believe to be the error of that conclusion to the best of our ability in Corning's Brief at 20-38, and we respectfully refer the Court to that discussion. The Third Circuit Court of Appeals concluded that work on a steady night shift is not a similar working condition.[7]

Both circuit courts explicitly concluded that the Act is inapplicable if work on a steady night shift is a different "working condition" than day work.[8]

The Secretary has raised two arguments in this regard which require further response.

First, the Secretary has expanded upon the Second Circuit's suggestion[9] that the term "similar working conditions" as used in the Act was used in a "technical" sense rather than in the ordinary usage of the words.

The Secretary now claims that "working conditions" as used in the Act means only "physical surroundings" and "hazards"[10] and does not include work on a steady night shift.

We believe that the legislative history will not support the view that Congress intended such a distinction and we have fully discussed the legislative history in Corning's Brief at 20-32. The Secretary's reliance upon testimony of job evaluation experts (who did not discuss the "night-day"

[6] App. (2d Cir.) 203. The abbreviation "App. (2d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-29. The abbreviation "App. (3d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-695.

[7] App. (3d Cir.) 207.

[8] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207.

[9] App. (2d Cir.) 202-03.

[10] Secretary's Brief at 25-32.

question) before the House of Representatives Committee on Education and Labor[11] is misplaced and we have discussed this in Corning's Brief at 29-30 and n.53.[12]

The Secretary's suggestion that work during hours when human beings sleep is under a similar "physical surrounding" as work during hours when human beings are ordinarily awake is absurd.

Certainly, it is contrary to all of the authorities which we have found in medicine, sociology, labor and management and to the statements of Congressmen who promoted the Act. We discuss the findings and conclusions of these authorities at 32-38 of Corning's Brief.

In concluding its argument on this general issue, the Secretary's Brief cited, at 35, four cases[13] decided by this Court which hold, *inter alia*, that a statute should not be read literally if to do so would produce an absurd result. It would seem much more appropriate that the principle applicable to the instant cases should be that a statute should be read as it is written where failure to do so would produce an absurd result.

---

[11] Secretary's Brief at 31.

[12] The Government also pointed to testimony by the late Dr. Paul Lehoczky (Secretary's Brief at 32) that work on a steady night shift was a "wage condition" and from that argues that it cannot be a "working condition" within the meaning of the Act. This characterization of Dr. Lehoczky's testimony is inaccurate because it is incomplete. Dr. Lehoczky went on to explain that work on a steady night shift is also a working condition but that it is not reflected in job evaluation systems. App. (3d Cir.) 97. We respectfully refer the Court to Corning's Brief at 30 n.53 for an explanation of the probable reasons for the existence of this distinction.

[13] *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940); *Hagger Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938); *United States v. Katz*, 271 U.S. 354, 357 (1926).

The second argument raised by the Secretary's Brief, at 32-35, is the proposition that, even if work on a steady night shift is a similar working condition to work during the day, the Act nevertheless applies to these cases because the union contracts provided shift differentials which paid employees a designated amount for such work.

We are surprised that the Secretary has adopted such an opportunistic, result oriented, view of this case and that it now seeks to advance this proposition which it did not urge upon either the Second or Third Circuit Courts of Appeal (and which it implicitly rejected in the Second Circuit) and which is in disagreement with the Secretary's official administrative statements directly covering the matter.

The district court in the New York case found that work on a steady night shift was not under a similar working condition as day work. However, it concluded that the contract shift differential "adequately compensates employees for working undesirable times of day."[14]

The Secretary, in briefing and arguing Corning's appeal to the Second Circuit, in which the threshold issue on appeal was the district court's decision on this question, did not urge the adoption of the district court's decision. Instead, the Secretary implicitly rejected the district court's reasoning and argued that working conditions were similar.[15] The Secretary did not argue, in the alternative, that the district court's view on this issue should be adopted.

Apparently, however, the Secretary has now concluded that winning these cases is more important than the sensible and consistent application of the Equal Pay Act.

---

[14] App. (2d Cir.) 162.

[15] Brief for Appellee (2d Cir.) at 21-28.

We are convinced that our indictment of the Secretary's approach to this issue is not an overreaction. Not only is the Secretary's proposition, here advanced, squarely contrary to the Secretary's own regulations, but it will destroy the statute as it has been known and applied since 1963.

The proposition advanced by the Secretary is that working conditions which are not similar can be compared under the Act by isolating the condition which is dissimilar and finding that condition to have been "adequately" compensated. This constitutes a gross misapplication of the Act and expands the role of district courts applying the Act far beyond that intended by Congress as reflected by the language of the Act, the legislative history, and the Secretary's published regulations, and far beyond the scope of any appellate court decision. If the Secretary is correct in its understanding of the Act, it will mean that it would be possible to find a violation of the Act even though the skill, effort, responsibility or working conditions are not "equal" or "similar" simply by concluding that the difference in the work is not commensurate with the difference in pay. It would make the district court the arbiter of whether a wage rate is fair, require the court to establish a fair rate and force the court to oversee wage bargains struck by labor and management.

Such an application is clearly not within the purpose of the Act.

The language of the Act, the legislative history and the Administrator's regulations make it plain that the Act has no application where the working conditions are not similar. Both of the Circuit Courts below so held.[16]

---

[16] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207.

The Secretary's regulations[17] make it clear that the Act does not apply to jobs which are not performed under similar conditions. Regulation 29 C.F.R. § 800.131 provides that:

> "In order for the equal pay standard to apply, the jobs must be performed under similar working conditions."

Similarly, Regulation 29 C.F.R. § 800.132 states that:

> "Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. However, in situations where some employees performing work meeting these standards have working conditions substantially different from those required for the performance of other jobs the equal pay principle would not apply."

This is the Secretary's language—his interpretation—and he is bound by it.[18] Really it is the only reasonable interpretation which could be drawn from the clear language of the Act.

It is indeed curious that the Secretary fails to discuss his own above-cited regulations which bear directly upon this question.

Instead, the Secretary has attempted to divert this Court from the Secretary's own regulations and the questions of law presented by these cases through an extended recitation of evidence which the Secretary claims indicates a discrim-

---

[17] 29 C.F.R. §§ 800.125-800.131 (1973).

[18] The Secretary's Regulations state that they indicate the construction of the law which the Secretary of Labor believes to be correct and that employers may rely upon them. 29 C.F.R. §§ 800.2-800.3. The latter was confirmed by Congressman Goodell in the House debates. 109 CONG. REC. 8697 (House, May 23, 1963).

inatory intent by Corning.[19] Not only is an employer's alleged discriminatory intent irrelevant under the Act where the working conditions (or the effort, skill or responsibility) are not equal, but the record is by no means clear on the question of Corning's intent in 1925-30 when the rate differential was created. The facts are that Corning has always paid everyone who worked the steady night shift inspection jobs the higher steady night shift base rate and has never paid this rate to persons working during the day.[20] The district court in the New York case found as a fact that women who performed the same job as male inspectors on the steady night shift during World War II were paid the higher steady night shift base rate as well as the applicable shift differential.[21] Thus, on the only occasion when the variable of sex was eliminated from the comparison jobs (while the night-day difference remained) the higher steady night shift base rate continued to be paid to both men and women night shift inspectors.

The truth of the matter is that no one can now say with any degree of certainty *why* Corning paid a higher base rate for steady night shift inspection work in 1925-30. It is, however, a fact that it was only paid for work steadily

---

[19] The Secretary's Brief devotes pp. 7-14, 18 and 22 to a discussion of the underlying evidence which it felt proved Corning's intent to discriminate against women, including a prolonged discussion of the archaic SJ&H Job Evaluation Plan, which the New York district court found to be lacking in probative value under the Equal Pay Act because the Plan failed to take physical effort, among other things, into account in measuring the worth of jobs. App. (2d Cir.) 157.

[20] App. (2d Cir.) 150-51, 154; App. (3d Cir.) 176, 177.

[21] App. (2d Cir.) 150-51. Since no one could remember how employees were paid at the Wellsboro plant during World War II, the Pennsylvania district court made no direct finding on this point. App. (3d Cir.) 183.

at night and to all inspectors who worked steadily at night.[22]

Further, the legislative history, as well as the Secretary's Regulations, establish the proposition that the Act is just not applicable if working conditions are not similar.

Congressman Goodell, in the House debates, stated that:

> "We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 CONG. REC. 9197 (House, May 23, 1963); Corning's Brief at Add. B, B-27.

---

[22] The Secretary (and the Second Circuit as well) points to speculation by the Corning Manager of Statistics and Surveys that one of the reasons the higher steady night shift rate was paid in 1925-30 was to induce men to agree to perform what they felt was demeaning, female work. (Secretary's Brief at 8-9, 22). Of course, none of the persons who were deposed or who testified at trial in the New York case was employed by Corning during the 1925-30 period. Any comment on this subject was purely speculation and should have been entitled to little probative value. It should be noted that the witness whose testimony was relied upon also speculated that the higher rate was paid in 1925 because the men moving to these jobs had lost the opportunity to work on incentive-paid jobs and also lost overtime opportunities which they may have enjoyed on the jobs which they had previously worked. He also mentioned "disagreeable hours" as another reason for payment of the rates. App. (2d Cir.) 120. The Secretary's Brief, at 22, implies that the presence of a plant-wide union contract shift differential somehow nullifies the possibility that the higher base wage rate was related to the fact that the work was done at night. However, it must be remembered that the higher base wage rate arose in 1925-30, before the advent of a union at either Corning plant, and before the creation of a plant-wide shift differential. App. (2d Cir.) 150-51; App. (3d Cir.) 183-84.

Congressman Goodell also stated:

> "In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it." 109 CONG. REC. 9198 (House, May 23, 1963); Corning's Brief at Add. B, B-29-30.

Thus, as Congressman Goodell pointed out, the language of the Act was changed from that which had been unsuccessfully proposed the prior year to include a specific reference to skill, effort, responsibility and working conditions with the specific intent that the Act should apply to jobs only where each of these elements were equal or similar, as the case may be. Where these elements are not equal or working conditions not similar the wage rate is left to the free process of collective bargaining, subject, of course, to supervision under Title VII of the Civil Rights Act which, in broad language, prohibits discrimination in employment.[23]

The Secretary's Brief, at 33-34, cites three cases [24] which it suggests support the view of the Act which the Secretary has now adopted in his Brief.

In *Hodgson v. Brookhaven*, 436 F.2d 719 (5th Cir. 1970), the Fifth Circuit reversed and remanded the matter to the district court because that court's fact findings were insufficient to support its conclusion that the jobs being compared involved equal skill, effort and responsibility. The footnote (436 F.2d 723 n.3) quoted by the Secretary in its

---

[23] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

[24] *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972); *Wirtz v. Basic Inc.*, 256 F.Supp. 786 (D.C. Nev. 1966).

Brief, at 33-34, merely pointed out that although the evidence suggested that working conditions in one section of the hospital were more unpleasant than at another section, employees were not paid differently when working in the more disagreeable section. Thus, the Fifth Circuit commented that this unpleasantness could not account for the pay differential.

In sharp contrast, in the instant cases, all persons who have worked the disagreeable steady night shift jobs in dispute received a higher base rate than persons who worked on the comparison jobs during the day.

The cases of *Hodgson v. Miller Brewing,* 457 F.2d 221 (7th Cir. 1972), and *Wirtz v. Basic Inc.,* 256 F.Supp. 786 (D.C. Nev. 1966), both involved situations in which men worked during the day shifts as well as at night while women worked only during the day. Nevertheless, the men were paid a higher base rate when working on the same job as the women during the day. Thus, the courts found violations comparing the jobs as performed during the day. A night-day comparison was not involved.

The language of the Act, the legislative history, and the Administrator's Regulations make it plain that the Act has no application where "working conditions" are not similar on the jobs being compared.

The plain meaning of the words of the Act, as defined by ordinary usage and also as defined by authorities in medicine, sociology, labor, management, and by the statements of the Congressman (Goodell) who was most active in promoting the passage of the Act, is that work on a steady night shift is not a similar "working condition" compared with work during the day.

On the basis of the facts and reasons set forth herein and in Corning's Brief, we respectfully request that this Court conclude that work on a steady night shift is not performed under a similar working condition as work during the day and that the Equal Pay Act is inapplicable.

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the Union making the steady night shift inspection jobs available to women without reducing any employee's wage rate.

The Secretary's argument, with respect to Question II of the Questions Presented, that Corning failed to adhere to the Act when it gave all women inspectors an opportunity to work on night shift inspection jobs in June, 1966, fails to apply the statute to the facts and is based upon a misunderstanding of the legislative history.

It is not disputed that on June 1, 1966, the steady night inspection jobs at the Corning, New York, plants[25] were made available to women[26] and that, by June 20, 1966, all of the women then working on the day shift jobs had an opportunity to accept work on these jobs.[27]

Thus, after June 1, 1966, both men and women worked the steady night shift inspection jobs and received the higher steady night shift rate of pay. It is clear that there was no residual discrimination on the basis of sex because

---

[25] The Third Circuit held that the Act was not applicable because it held that work performed on the steady night shift is not performed under similar working conditions to work performed during the day. Accordingly, it did not reach Questions II and III which are presented for this Court's review and only the fact findings and conclusions of law in the Second Circuit case are relevant to these questions.

[26] Corning's Brief at 9-11, 38.

[27] Corning's Brief at 39 n.63b.

all of the women who had worked as day shift inspectors in the Corning establishments involved in that case had the opportunity to accept work on the steady night shift jobs.

The sole basis upon which the Second Circuit Court of Appeals concluded that the violation of the Act continued after June 1, 1966, was the meaning which that court attributed to the "reduction proviso" of the Act, which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

The Second Circuit, relying upon the legislative history, held that the "reduction proviso" meant that the employer must increase the rate of the lower rated job.[28]

Corning argues in its Brief, at 41-46, that the words "shall not reduce" are not ambiguous and that resort to legislative history is improper absent a determination that an ambiguity exists and, further, that an interpretation of the words "shall not reduce" to mean "shall increase the rates of the lower rated jobs" is not even a credible definition of the statutory language.

The Secretary's Brief, at 38, dismisses, as a mere "semantic argument," our contention that the statutory language "shall not reduce" should not be read to mean "shall increase." The Secretary concedes that Corning did not "reduce" wage rates[29] but claims that "we need not reach the issue of whether Corning has complied with the no-reduction *proviso;* it did not comply with the core requirement of equal pay for equal work."[30]

---

[28] App. (2d Cir.) 210.

[29] Secretary's Brief at 38.

[30] *Id.*

This is the first time that the Secretary has suggested, in any court in this case, that a violation could be found after June 1, 1966, by applying the Act to the facts without resort to the reduction proviso.

We do not believe that this view can withstand close scrutiny. Certainly, the implications of this interpretation upon the application of the Act are profound. If correct, it would mean that the "core requirement of equal pay for equal work"[31] requires that comparison jobs be paid the same even though both sexes are working on both jobs (the situation that existed in the Second Circuit case after June 1, 1966).[32] Clearly the language of the Act does not support this interpretation.

The Second Circuit held that Corning continued to violate the Act after June 1, 1966, solely on the ground that the legislative history indicated that the "reduction proviso" of the Act required an increase in the wage rate of the lower rated job.

As we point out in Corning's Brief, at 41-46, in examining the legislative history, the Second Circuit relied solely upon discussions which occurred in the Congress during hearings on H.R. 3861, a bill which did not become law and which contained an explicit requirement that the wage rate of the lower rated job be raised to that of the higher rated job. This requirement was not included in H.R. 6060, which eventually became law and which provided that an employer shall not reduce wage rates to obtain compliance.

The Secretary's statement that H.R. 3861 was not "more explicit" than H.R. 6060 in requiring that wage rates be raised is inaccurate.

---

[31] *Id.*

[32] Corning's Brief at 38-39.

H.R. 3861 provided as follows:

> "*Provided,* That an employer who, on the date of this enactment, is paying a wage rate differential which would be in violation of the Act on its effective date may *adjust the lower wage rate* as follows:
>
> "(1) On the effective date of this Act, all wage rate differentials shall be reduced by an amount equal to 10 per centum of the higher wage rate in effect on the date of enactment;
>
> "(2) One year from the effective date of this Act, remaining wage rate differentials shall be reduced by an amount equal to 15 per centum of the higher wage rate in effect on the date of enactment;
>
> "(3) Two years from the effective date of this Act any remaining wage rate differential shall be removed." [Emphasis supplied.] (Reprinted at Add. C of Corning's initial Brief; the quoted portion is found at C-5.)

This explicitly states that the wage rate of the lower job must be increased to the rate of the higher rated job over a two-year period.[33]

Furthermore, the House hearings made it clear that both Congressmen and the Secretary were dissatisfied with H.R. 3861 because they thought it would require the lower rate to be raised to the level of the higher.[34]

---

[33] In addition, the Secretary implies that the possibility that compliance would be achieved by reducing the higher rate "was sharply criticized later in the hearings." These comments, however, did not come from a Congressman or the Secretary who would have realized that Section 4 of H.R. 3861 mandated an increase in the lower rate. Instead, they were the remarks of an AFL-CIO official who, perhaps, was not completely familiar with H.R. 3861. The referenced remarks appear in the statement of James B. Carey, Secretary-Treasurer, Industrial Union Dep't, AFL-CIO, and President, IUE, AFL-CIO. *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor,* 88th Cong., 1st Sess. 108-20 (1963).

[34] Corning's Brief at 41-43; *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor,* 88th Cong. 1st Sess. 64-65 (1963); Corning's Brief, Add. A, A-6-8.

It was in this context that H.R. 6060 and the statute as enacted removed the mandate that the lower rate be increased which was contained in H.R. 3861 and provided instead that the higher rated job could not be reduced in order to achieve compliance.

The Secretary is seeking to obtain an interpretation of the statutory language of the "reduction proviso" which would impose a more harsh remedy upon an employer than that provided by H.R. 3861 which explicitly mandated an increase in the lower rated job over a period of time.

We have fully dealt with the legislative history relevant to this issue in Corning's Brief at 41-46 and we respectfully refer the Court to that discussion.

The Secretary's Brief, at 39 n.21, suggests that Corning violated the "reduction proviso" because seven men who had worked as steady night shift inspectors accepted inspection jobs performed during the day. The fact that men exercised their seniority to claim day shift work at the lower day shift rate does not indicate that Corning reduced the rate of jobs in violation of the reduction proviso. The action that Corning took was to open the inspection jobs to both men and women. No employee's wage rate was reduced by Corning.[35]

[35] It should be noted that the Secretary's reference, in its Statement of Facts (Secretary's Brief at 13 n.10), to women remaining on steady night shift inspection jobs for short periods of time was limited to the Wellsboro, Pennsylvania, plant (Third Circuit case) which is not involved in this issue. The same limitation is applicable to the Secretary's reference (Secretary's Brief at 13) to an "84 day rule" which it implies may inhibit women from accepting steady night shift work because of a desire to avoid "dismissal" in the event of a reduction in force. This statement is inaccurate, even as applied to the Pennsylvania plant, because the women would not be "dismissed." They would merely exercise their seniority to return to day shift jobs.

Finally, the Secretary has erected a strawman in its suggestion that we urge that rights accruing under the Equal Pay Act can be waived in collective bargaining.

Our contention is that Congress intended to afford a maximum flexibility to free collective bargaining in adjusting rate relationships. In this case the adjustment agreed upon was to open the inspection jobs on the steady night shift to women without reducing any employee's wage rate. Our views concerning the importance of maintaining this freedom are set forth in Corning's Brief at 48-49.

For the reasons set forth above and in Corning's Brief at 38-50, we respectfully request that the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since June 1, 1966.

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

We adequately anticipated the Secretary's arguments in respect to this issue in our main brief, except the Secretary's reliance upon three Title VII cases in support of its contention that the protection of all persons employed by Corning on January 20, 1969, to a higher rate when working on steady night shift inspection jobs perpetuates discrimination.[36]

---

[36] Secretary's Brief at 44.

Each of these cases turns upon principles which are not involved in this case.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the employer had discriminatorily excluded blacks from working in certain jobs on the basis of their race. Subsequently, the employer had eliminated the blatant racial barrier and substituted testing and educational requirements which the court found to be unrelated to performance of the work and which effectively excluded blacks from the jobs. Thus, the Court struck down the discriminatory job requirements.

In both *United States v. Bethlehem Steel Co.*, 446 F.2d 652 (2nd Cir. 1971) and *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971), the district courts had found that the employer had assigned blacks to undesirable jobs on the basis of their race and that the seniority provisions of the collective bargaining agreement discouraged black employees from exercising transfer rights to more desirable jobs because they were compelled to accept a lower rate and loss of accrued departmental seniority. Thus, the courts ruled that the black employees should be protected through special provisions for rate retention and seniority carryover on transfer from the undesirable jobs.

Compare those cases with the instant case.

The steady night shift jobs had been completely integrated long prior to January, 1969. All women working as day shift inspectors had the opportunity to take steady night shift inspection jobs as early as June 20, 1966.[37]

The 1969 collective bargaining agreement established a single "job evaluated" rate for each of the disputed jobs

[37] Corning's Brief at 38.

which was found to be a fair, non-discriminatory rate, "not based on sex."[38]

All persons employed on the date of the agreement at any jobs in the plant were protected to a higher "red circle" rate in the event that they should accept employment on a steady night shift inspection job.[39]

We have fully discussed our analysis of the effect of this agreement under the Equal Pay Act in Corning's Brief at 50-53. We believe that it is clear that these facts are distinguishable from those of the cases discussed above.

For the reasons set forth above and in Corning's Brief at 50-53, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since January 20, 1969.

---

[38] App. (2d Cir.) 183.

[39] App. (2d Cir.) 183-84; Corning's Brief at 50-51.

IV. Conclusion

For the reasons stated in this Reply Brief as well as the reasons stated in Corning's Brief, we respectfully request that this Court follow the principles extensively set forth in the Conclusion of Corning's Brief at 54-55.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
EDWARD N. STONER II,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

March 19, 1974.

CORNING GLASS WORKS *v.* BRENNAN, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73-29. Argued March 25, 1974—Decided June 3, 1974*

Male employees at the Corning Glass Works (Corning) previously performed night shift inspection and were paid more than females, who performed the day shift inspection. A plantwide shift differential that subsequently came with unionization was superimposed on the existing base-wage difference between male night inspectors and female day inspectors. Thereafter, beginning June 1, 1966, Corning began to open up night shift jobs for women, who on an equal seniority basis with men were able to bid for the higher paid night inspection jobs as vacancies occurred. On January 20, 1969, a new "job evaluation" system for setting wage rates took effect, under which all subsequently hired inspectors were to receive the same base wage (which was higher than the previous night shift rate) regardless of sex or shift. Employees hired before that date, however, when working night shift were to continue to receive a higher ("red circle") rate, thus perpetuating the previous differential in base pay between day and night inspectors. The Secretary of Labor brought these actions for backpay and injunctive relief against Corning, claiming that violations of the Equal Pay Act of 1963 had occurred at its Corning, N. Y. (No. 73-29), and Wellsboro, Pa. (No. 73-695), plants. In No. 73-29, the District Court granted relief, and the Court of Appeals for the Second Circuit affirmed, concluding that Corning's practice violated the Act, while the District Court in No. 73-695 held that the Act had not been violated and the Court of Appeals for the Third Circuit affirmed. In order to establish a violation of the Act, it must be shown that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working condi-

*Together with No. 73-695, *Brennan, Secretary of Labor* v. *Corning Glass Works*, on certiorari to the Court of Appeals for the Third Circuit.

tions," except where the difference in payment is made pursuant to a seniority or merit system or one measuring earnings by quantity or quality of production, or where the differential is "based on any other factor other than sex." *Held:*

1. Corning violated the Act during the period from its effective date to June 1966. Pp. 195–205.

(a) The statutory term "working conditions," as is clear from the Act's legislative history, encompasses only physical surroundings and hazards and not the time of day worked. Pp. 197–204.

(b) The record amply supports the conclusion of the District Court in No. 73–29 that Corning had not sustained its burden of proof that the higher base wage for pre-June 1966 all-male night inspection work was in fact intended to serve as added compensation for night work, and thus was based on a "factor other than sex." Substantial evidence showed that the differential arose simply because men would not work at the low rates paid women inspectors and reflected a job market in which Corning could pay women less than men for the same work. Pp. 204–205.

2. Corning did not cure its violation in June 1966 by permitting women to work as night shift inspectors, since the violation could not have been cured except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors Pp. 205–208.

3. The violation was not cured in 1969, when Corning equalized day and night inspector wage rates, since the "red circle" rate perpetuated the discrimination. Pp. 208–210.

No. 73–29, 474 F. 2d 226, affirmed; No. 73–695, 480 F. 2d 1254, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and POWELL, JJ., joined. BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 210. STEWART, J., took no part in the consideration or decision of the cases.

Scott F. Zimmerman argued the cause for petitioner in No. 73–29 and for respondent in No. 73–695. With him on the briefs was *Walter P. DeForest III*.

Allan Abbot Tuttle argued the cause for petitioner in No. 73–695 and for respondent in No. 73–29. With him on the brief were *Solicitor General Bork*, *Deputy Solici-*

tor General Wallace, Sylvia S. Ellison, and *Helen W. Judd.*†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise under the Equal Pay Act of 1963, 77 Stat. 56, § 3, 29 U. S. C. § 206 (d)(1),[1] which added to § 6 of the Fair Labor Standards Act of 1938 the principle of equal pay for equal work regardless of sex. The principal question posed is whether Corning Glass Works violated the Act by paying a higher base wage to male night shift inspectors than it paid to female inspectors performing the same tasks on the day shift, where the higher wage was paid in addition to a separate night shift differential paid to all employees for night work. In No. 73–29, the Court of Appeals for the Second Circuit, in a case involving several Corning plants in Corning, New York, held that this practice vio-

†Briefs of *amici curiae* were filed in both cases by *Milton Smith, Gerard C. Smetana, Lawrence D. Ehrlich,* and *Jerry Kronenberg* for the Chamber of Commerce of the United States, and by *Ruth Bader Ginsburg* and *Melvin L. Wulf* for the American Civil Liberties Union et al.

[1] "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

lated the Act. 474 F. 2d 226 (1973). In No. 73–695, the Court of Appeals for the Third Circuit, in a case involving a Corning plant in Wellsboro, Pennsylvania, reached the opposite conclusion. 480 F. 2d 1254 (1973). We granted certiorari and consolidated the cases to resolve this unusually direct conflict between two circuits. 414 U. S. 1110 (1973). Finding ourselves in substantial agreement with the analysis of the Second Circuit, we affirm in No. 73–29 and reverse in No. 73–695.

I

Prior to 1925, Corning operated its plants in Wellsboro and Corning only during the day, and all inspection work was performed by women. Between 1925 and 1930, the company began to introduce automatic production equipment which made it desirable to institute a night shift. During this period, however, both New York and Pennsylvania law prohibited women from working at night.[2] As a result, in order to fill inspector positions on the new night shift, the company had to recruit male employees from among its male dayworkers. The male employees so transferred demanded and received wages substantially higher than those paid to women inspectors engaged on the two day shifts.[3] During this same period, however,

[2] New York prohibited the employment of women between 10 p. m. and 6 a. m. See 1927 N. Y. Laws, c. 453; 1930 N. Y. Laws, c. 868. Pennsylvania also prohibited them from working between 10 p. m. and 6 a. m. See Act of July 25, 1913, Act No. 466, Pa. Laws 1913.

[3] Higher wages were demanded in part because the men had been earning more money on their day shift jobs than women were paid for inspection work. Thus, at the time of the creation of the new night shift, female day shift inspectors received wages ranging from 20 to 30 cents per hour. Most of the men designated to fill the newly created night shift positions had been working in the blowing room where the lowest wage rate was 48 cents per hour and where additional incentive pay could be earned. As night shift inspectors these men received 53 cents per hour. There is also some evidence

no plant-wide shift differential existed and male employees working at night, other than inspectors, received the same wages as their day shift counterparts. Thus a situation developed where the night inspectors were all male,[4] the day inspectors all female, and the male inspectors received significantly higher wages.

In 1944, Corning plants at both locations were organized by a labor union and a collective-bargaining agreement was negotiated for all production and maintenance employees. This agreement for the first time established a plant-wide shift differential,[5] but this change did not eliminate the higher base wage paid to male night inspectors. Rather, the shift differential was superimposed on the existing difference in base wages between male night inspectors and female day inspectors.

Prior to June 11, 1964, the effective date of the Equal Pay Act,[6] the law in both Pennsylvania and New York

---

in the record that additional compensation was necessary because the men viewed inspection jobs as "demeaning" and as "women's work."

[4] A temporary exception was made during World War II when manpower shortages caused Corning to be permitted to employ women on the steady night shift inspection jobs at both locations. It appears that women night inspectors during this period were paid the same higher night shift wages earned by the men.

[5] The shift differential was originally three cents an hour for the afternoon shift and five cents an hour for the night shift. It has been increased to 10 and 16 cents per hour respectively.

[6] Section 4 of the Equal Pay Act provided that the Act would take effect upon the expiration of one year from June 10, 1963, the date of its enactment, except that in the case of employees covered by a bona fide collective-bargaining agreement in effect at least 30 days prior to the date of enactment, the Act would take effect upon the termination of such collective-bargaining agreement. It is conceded that the Act became effective with respect to the Corning, New York, plants on June 11, 1964, though it is also stipulated that the statute of limitations barred all claims for backpay prior to November 1, 1964. With respect to the Wellsboro plant, there is

was amended to permit women to work at night.[7] It was not until some time after the effective date of the Act, however, that Corning initiated efforts to eliminate

---

apparently some dispute between the company and the Secretary as to when the Act took effect. Corning evidently believes the Act took effect on January 20, 1965, because of an outstanding collective-bargaining agreement. The Secretary claims that this agreement was reopened on January 24, 1964, and that the plant therefore became subject to the Act's requirements on June 11, 1964, one year after enactment. We see no need to resolve this question as it appears that, in any event, the parties agree the statute of limitations bars recovery of back wages for any violation prior to October 1966.

[7] In New York, a 1953 amendment allowed females over the age of 21 to work after midnight in factories operating multiple shifts where the Industrial Commissioner found transportation and safety conditions to be satisfactory and granted approval. See 1953 N. Y. Laws, c. 708, amending N. Y. Labor Law § 172, formerly codified at N. Y. Labor Law § 173 (3)(a)(1) (1965). In Pennsylvania, the law was amended in 1947 to permit women to work at night conditioned upon the approval of the State Department of Labor and Industry, Pa. Laws 1947, Act No. 543, p. 1397, codified at Pa. Stat. Ann., Tit. 43, § 104 (Supp. 1974–1975), but state regulations required that, in order to obtain approval to employ women at night, an employer was required to furnish transportation where public transportation was not available. The District Court in No. 73–695 found that public transportation was not available in Wellsboro and that it was not economically feasible for Corning to furnish transportation for its female employees. In July 1965, however, the Pennsylvania regulations were amended to permit employers to hire women at night where regular private transportation is available. Pa. Dept. of Labor and Industry, Regulations Relating to Hours of Work and Conditions of Employment of Women in Pa., Rule S–8 (c) (1966).

In 1969, both New York and Pennsylvania repealed, either expressly or by implication, those special night-work restrictions for women cited above. See 2 N. Y. Laws 1969, c. 1042, § 2, p. 2630, repealing N. Y. Labor Law § 173.3.a (1) (1965) and replacing it with § 177.1 (c), which was subsequently repealed in 1973, 1 N. Y. Laws 1973, c. 377, § 11, p. 1336; Pa. Laws 1969, Act No. 56, p. 133, which, by including sex as a prohibited form of discrimination, Pa.

the differential rates for male and female inspectors. Beginning in June 1966, Corning started to open up jobs on the night shift to women. Previously separate male and female seniority lists were consolidated and women became eligible to exercise their seniority, on the same basis as men, to bid for the higher paid night inspection jobs as vacancies occurred.

On January 20, 1969, a new collective-bargaining agreement went into effect, establishing a new "job evaluation" system for setting wage rates. The new agreement abolished for the future the separate base wages for day and night shift inspectors and imposed a uniform base wage for inspectors exceeding the wage rate for the night shift previously in effect. All inspectors hired after January 20, 1969, were to receive the same base wage, whatever their sex or shift. The collective-bargaining agreement further provided, however, for a higher "red circle" rate for employees hired prior to January 20, 1969, when working as inspectors on the night shift. This "red circle" rate served essentially to perpetuate the differential in base wages between day and night inspectors.

The Secretary of Labor brought these cases to enjoin Corning from violating the Equal Pay Act [8] and to collect back wages allegedly due female employees because of past violations. Three distinct questions are presented:

Stat. Ann., Tit. 43, § 951 *et seq.* (Supp. 1974–1975), impliedly voided all laws and regulations specifically protecting one sex. See Op. Atty. Gen. No. 69–304, Dec. 5, 1969.

[8] The District Court in No. 73–29 issued a broadly worded injunction against all future violations of the Act. The Court of Appeals modified the injunction by limiting it to inspectors at the three plants at issue in that case, largely because of that court's belief that "Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring itself into compliance." 474 F. 2d 226, 236 (CA2 1973). Since the Government did not seek certiorari from this aspect of the Second Circuit's judgment, we have no occasion to consider this question.

(1) Did Corning ever violate the Equal Pay Act by paying male night shift inspectors more than female day shift inspectors? (2) If so, did Corning cure its violation of the Act in 1966 by permitting women to work as night shift inspectors? (3) Finally, if the violation was not remedied in 1966, did Corning cure its violation in 1969 by equalizing day and night inspector wage rates but establishing higher "red circle" rates for existing employees working on the night shift?

II

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Ibid.*

The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Although the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue,[9] as both of the courts below recognized.[10]

---

[9] See 109 Cong. Rec. 9196 (1963) (Rep. Frelinghuysen); 109 Cong. Rec. 9208 (Rep. Goodell).

[10] *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, 231 (CA2 1973); *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254, 1258 (CA3

The Act also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held,[11] and this view is consistent with the general rule that the application of an exemption under the Fair Labor

---

1973). See also *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1049 (CA5 1973); *Hodgson* v. *Golden Isles Convalescent Homes, Inc.*, 468 F. 2d 1256, 1257 (CA5 1972); *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (CA4 1972); *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 722 (CA5 1970); *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 360 (CA8 1970).

[11] See *Hodgson* v. *Corning Glass Works*, *supra*, at 231; *Brennan* v. *Corning Glass Works*, *supra*, at 1258; *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F. 2d 589, 597 (CA3), cert. denied *sub nom. Brennan* v. *Robert Hall Clothes, Inc.*, 414 U. S. 866 (1973); *Hodgson* v. *Security Nat. Bank of Sioux City*, 460 F. 2d 57, 59 n. 4 (CA8 1972); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (CA3), cert. denied, 398 U. S. 905 (1970); *Shultz* v. *American Can Co.*, *supra*, at 362; *Shultz* v. *First Victoria Nat. Bank*, 420 F. 2d 648, 654 n. 8 (CA5 1969); *Hodgson* v. *Industrial Bank of Savannah*, 347 F. Supp. 63, 67 (SD Ga. 1972); *Hodgson* v. *Maison Miramon, Inc.*, 344 F. Supp. 843, 845 (ED La. 1972); *Hodgson* v. *J. W. Lyles, Inc.*, 335 F. Supp. 128, 131 (Md. 1971), aff'd, 468 F. 2d 625 (CA4 1972); *Hodgson* v. *City Stores, Inc.*, 332 F. Supp. 942, 947 (MD Ala. 1971); *Shultz* v. *Kimberly-Clark Corp.*, 315 F. Supp. 1323, 1332 (WD Tenn. 1970); *Wirtz* v. *Basic Inc.*, 256 F. Supp. 786, 790 (Nev. 1966). See also 29 CFR § 800.141 (1973).

Standards Act is a matter of affirmative defense on which the employer has the burden of proof.[12]

The contentions of the parties in this case reflect the Act's underlying framework. Corning argues that the Secretary has failed to prove that Corning ever violated the Act because day shift work is not "performed under similar working conditions" as night shift work. The Secretary maintains that day shift and night shift work are performed under "similar working conditions" within the meaning of the Act.[13] Although the Secretary recognizes that higher wages may be paid for night shift work, the Secretary contends that such a shift differential would be based upon a "factor other than sex" within the catch-all exception to the Act and that Corning has failed to carry its burden of proof that its higher base wage for male night inspectors was in fact based on any factor other than sex.

The courts below relied in part on conflicting statements in the legislative history having some bearing on

---

[12] See *A. H Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493 (1945); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960); *Walling* v. *General Industries Co.*, 330 U. S. 545, 547–548 (1947); *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295 (1959).

[13] The Secretary also advances an argument that even if night and day inspection work is assumed not to be performed under similar working conditions, the differential in base wages is nevertheless unlawful under the Act. The additional burden of working at night, the argument goes, was already fully reflected in the plant-wide shift differential, and the shifts were made "similar" by payment of the shift differential. This argument does not appear to have been presented to either the Second or the Third Circuit, as the opinions in both cases reflect an assumption on the part of all concerned that the Secretary's case would fail unless night and day inspection work was found to be performed under similar working conditions. For this reason, and in view of our resolution of the "working condition" issue, we have no occasion to consider and intimate no views on this aspect of the Secretary's argument.

this question of statutory construction. The Third Circuit found particularly significant a statement of Congressman Goodell, a sponsor of the Equal Pay bill, who, in the course of explaining the bill on the floor of the House, commented that "standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, *difference in shift*, all would logically fall within the working condition factor." 109 Cong. Rec. 9209 (1963) (emphasis added). The Second Circuit, in contrast, relied on a statement from the House Committee Report which, in describing the broad general exception for differentials "based on any other factor other than sex," stated: "Thus, among other things, shift differentials . . . would also be excluded. . . ." H. R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963).

We agree with Judge Friendly, however, that in this case a better understanding of the phrase "performed under similar working conditions" can be obtained from a consideration of the way in which Congress arrived at the statutory language than from trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports. As Mr. Justice Frankfurter remarked in an earlier case involving interpretation of the Fair Labor Standards Act, "regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952).

The most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful to employers and workable across the broad range of industries covered

by the Act. As originally introduced, the Equal Pay bills required equal pay for "equal work on jobs the performance of which requires equal skills." There were only two exceptions—for differentials "made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex. . . ." [14]

In both the House and Senate committee hearings, witnesses were highly critical of the Act's definition of equal work and of its exemptions. Many noted that most of American industry used formal, systematic job evaluation plans to establish equitable wage structures in their plants.[15] Such systems, as explained coincidentally by a representative of Corning Glass Works who testified at both hearings, took into consideration four separate factors in determining job value—skill, effort, responsibilty and working conditions—and each of these four components was further systematically divided into various subcomponents.[16] Under a job evaluation plan, point values are assigned to each of the subcomponents of a given job, resulting in a total point figure representing a relatively objective measure of the job's value.

In comparison to the rather complex job evaluation plans used by industry, the definition of equal work used in the first drafts of the Equal Pay Act was criticized as

---

[14] See S. 882, 88th Cong., 1st Sess., § 4 (1963); cf. S. 910, 88th Cong., 1st Sess., § 4 (a) (1963).

[15] See, *e. g.*, Hearings On Equal Pay Act of 1963 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., 26, 73, 79, 124, 140, 178 (1963) (hereinafter Senate Hearings); Hearings on Equal Pay Act before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., 145–146 (1963) (hereinafter House Hearings).

[16] See Senate Hearings 96–104; House Hearings 232–240. See also House Hearings 304–305, 307–308.

unduly vague and incomplete. Industry representatives feared that as a result of the Act's definition of equal work, the Secretary of Labor would be cast in the position of second-guessing the validity of a company's job evaluation system. They repeatedly urged that the bill be amended to include an exception for job classification systems, or otherwise to incorporate the language of job evaluation into the bill.[17] Thus Corning's own representative testified:

> "Job evaluation is an accepted and tested method of attaining equity in wage relationship.
>
> "A great part of industry is committed to job evaluation by past practice and by contractual agreement as the basis for wage administration.
>
> " 'Skill' alone, as a criterion, fails to recognize other aspects of the job situation that affect job worth.
>
> "We sincerely hope that this committee in passing legislation to eliminate wage differences based on sex alone, will recognize in its language the general role of job evaluation in establishing equitable rate relationship." [18]

We think it plain that in amending the Act's definition of equal work to its present form, the Congress acted in direct response to these pleas. Spokesmen for the amended bill stated, for example, during the House debates:

> "The concept of equal pay for jobs demanding equal skill has been expanded to require also equal effort, responsibility, and similar working conditions. These factors are the core of all job classification

---

[17] See, *e. g.*, Senate Hearings 73, 74, 79, 124, 130, 138, 140, 178; House Hearings 145, 146, 159, 199–200.

[18] Senate Hearings 98; House Hearings 234.

> systems. They form a legitimate basis for differentials in pay." [19]

Indeed, the most telling evidence of congressional intent is the fact that the Act's amended definition of equal work incorporated the specific language of the job evaluation plan described at the hearings by Corning's own representative—that is, the concepts of "skill," "effort," "responsibility," and "working conditions."

Congress' intent, as manifested in this history, was to use these terms to incorporate into the new federal act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act. The House Report emphasized:

> "This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H. R. Rep. No. 309, *supra*, at 3.

It is in this light that the phrase "working conditions" must be understood, for where Congress has used technical words or terms of art, "it [is] proper to explain them by reference to the art or science to which they [are] appropriate." *Greenleaf* v. *Goodrich*, 101 U. S. 278, 284 (1880). See also *NLRB* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 326 (1951) (Frankfurter, J., dissenting). This principle is particularly salutary where, as

[19] 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen). See also H. R. Rep. No. 309, 88th Cong., 1st Sess., 8 (1963).

here, the legislative history reveals that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections by industry representatives that statutory definitions were vague and incomplete.

While a layman might well assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations. As Corning's own representative testified at the hearings, the element of working conditions encompasses two subfactors: "surroundings" and "hazards." [20] "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of "working conditions" is not only manifested in Corning's own job evaluation plans but is also well accepted across a wide range of American industry.[21]

Nowhere in any of these definitions is time of day worked mentioned as a relevant criterion. The fact of the matter is that the concept of "working conditions," as used in the specialized language of job evaluation systems, simply does not encompass shift differentials. Indeed, while Corning now argues that night inspection work is not equal to day inspection work, all of its own job evaluation plans, including the one now in effect, have consistently treated them as equal in all respects,

---

[20] Senate Hearings 98–99; House Hearings 234–236.

[21] See D. Belcher, Wage and Salary Administration 271–274, 278, 287–289 (1955); 2 United States Dept. of Labor, Dictionary of Occupational Titles 656 (3d ed. 1965); United States Civil Service Commission, Job Grading System for Trades and Labor Occupations, F. P. M. Supp. 512–1, p. A3–3 (1970).

including working conditions.[22] And Corning's Manager of Job Evaluation testified in No. 73–29 that time of day worked was not considered to be a "working condition."[23] Significantly, it is not the Secretary in this case who is trying to look behind Corning's bona fide job evaluation system to require equal pay for jobs which Corning has historically viewed as unequal work. Rather, it is Corning which asks us to differentiate between jobs which the company itself has always equated. We agree with the Second Circuit that the inspection work at issue in this case, whether performed during the day or night, is "equal work" as that term is defined in the Act.[24]

---

[22] Pursuant to its 1944 collective-bargaining agreement, Corning adopted a job classification system developed by its consultants, labeled the SJ&H plan, which evaluated inspector jobs on the basis of "general schooling," "training period," "manual skill," "versatility," "job knowledge," "responsibility," and "working conditions." Under this evaluation, the inspector jobs, regardless of shift, were found equal in all respects, including "working conditions," which were defined as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the duties."

A new plan, put into effect in 1963–1964 and called the CGW plan, also found no significant differences in the duties performed by men and women inspectors and awarded the same point values for skill, effort, responsibility, and working conditions, regardless of shift.

[23] App. 66.

[24] In No. 73–29, Corning also claimed that the night inspection work was not equal to day shift inspection work because night shift inspectors had to do a certain amount of packing, lifting, and cleaning which was not performed by day shift inspectors. Noting that it is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable, the Court of Appeals concluded that the extra work performed by night inspectors was of so little consequence that the jobs remained substantially equal. See 474 F. 2d, at 234. See also *Shultz* v. *Wheaton Glass Co.*,

This does not mean, of course, that there is no room in the Equal Pay Act for nondiscriminatory shift differentials. Work on a steady night shift no doubt has psychological and physiological impacts making it less attractive than work on a day shift. The Act contemplates that a male night worker may receive a higher wage than a female day worker, just as it contemplates that a male employee with 20 years' seniority can receive a higher wage than a woman with two years' seniority. Factors such as these play a role under the Act's four exceptions—the seniority differential under the specific seniority exception, the shift differential under the catch-all exception for differentials "based on any other factor other than sex." [25]

The question remains, however, whether Corning carried its burden of proving that the higher rate paid for night inspection work, until 1966 performed solely by men, was in fact intended to serve as compensation for night work, or rather constituted an added payment based upon sex. We agree that the record amply supports the District Court's conclusion that Corning had not sustained its burden of proof.[26] As its history revealed,

---

421 F. 2d, at 265; *Shultz* v. *American Can Co.*, 424 F. 2d, at 360; *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d, at 493. The company has not pursued this issue here.

[25] An administrative interpretation by the Wage and Hour Administrator recognizes the legitimacy of night shift differentials shown to be a factor other than sex. See 29 CFR § 800.145 (1973).

[26] This question, as well as the questions discussed in Part III, *infra*, were considered by the District Court and the Court of Appeals only in No. 73-29, and not in No. 73-695, since in the latter case the courts below concluded that the Secretary had failed to prove that night and day shift inspection work was performed under similar working conditions. We deal with these issues, then, only on the basis of the record in No. 73-29. To the extent that there are any differences in the records in these two cases on factual

"the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks." 474 F. 2d, at 233. The differential in base wages originated at a time when no other night employees received higher pay than corresponding day workers and it was maintained long after the company instituted a separate plant-wide shift differential which was thought to compensate adequately for the additional burdens of night work. The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

III

We now must consider whether Corning continued to remain in violation of the Act after 1966 when, without changing the base wage rates for day and night inspectors, it began to permit women to bid for jobs on the night shift as vacancies occurred. It is evident that this was more than a token gesture to end discrimination, as turnover in the night shift inspection jobs was rapid. The record in No. 73–29 shows, for example, that during the two-year period after June 1, 1966, the date women were first permitted to bid for night inspection jobs, women took 152 of the 278 openings, and women with very little seniority were able to obtain positions on the night shift.

---

matters relating to these questions, we leave it to the District Court and the Court of Appeals in No. 73–695 to resolve these questions, in the first instance, on the basis of the record created in that case.

Relying on these facts, the company argues that it ceased discriminating against women in 1966, and was no longer in violation of the Equal Pay Act.

But the issue before us is not whether the company, in some abstract sense, can be said to have treated men the same as women after 1966. Rather, the question is whether the company remedied the specific violation of the Act which the Secretary proved. We agree with the Second Circuit, as well as with all other circuits that have had occasion to consider this issue, that the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors. This result is implicit in the Act's language, its statement of purpose, and its legislative history.

As the Second Circuit noted, Congress enacted the Equal Pay Act "[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor." 474 F. 2d, at 234. In response to evidence of the many families dependent on the income of working women, Congress included in the Act's statement of purpose a finding that "the existence . . . of wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency." Pub. L. 88–38, § 2 (a) (1), 77 Stat. 56 (1963). And Congress declared it to be the policy of the Act to correct this condition. § 2 (b).

To achieve this end, Congress required that employers pay equal pay for equal work and then specified:

> "*Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U. S. C. § 206 (d)(1).

The purpose of this proviso was to ensure that to remedy violations of the Act, "[t]he lower wage rate must be increased to the level of the higher." H. R. Rep. No. 309, *supra*, at 3. Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, "The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced." [27] Representative Griffin also thought it clear that "[t]he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." [28]

By proving that after the effective date of the Equal Pay Act, Corning paid female day inspectors less than male night inspectors for equal work, the Secretary implicitly demonstrated that the wages of female day shift inspectors were unlawfully depressed and that the fair wage for inspection work was the base wage paid to male inspectors on the night shift. The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition." § 2 (a)(5).

We agree with Judge Friendly that

> "In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower

[27] 109 Cong. Rec. 2714 (1963).

[28] House Hearings, *supra*, n. 15, at 65. See also 109 Cong. Rec., at 9196 (Rep. Thompson).

base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration; in effect, Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially low wage rate not justified by any factor other than sex." 474 F. 2d, at 235.

The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve. If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends. See *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 359 (CA8 1970); *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221, 227 (CA7 1972); *Hodgson* v. *Square D Co.*, 459 F. 2d 805, 808–809 (CA6 1972).

The company's final contention—that it cured its violation of the Act when a new collective-bargaining agreement went into effect on January 20, 1969—need not detain us long. While the new agreement provided for equal base wages for night or day inspectors hired after that date, it continued to provide unequal base wages for employees hired before that date, a discrimination likely to continue for some time into the future because of a large number of laid-off employees who had to be offered re-employment before new inspectors could be hired. After considering the rather complex method in which the new wage rates for employees hired prior to January 1969 were calculated and the company's stated purpose

behind the provisions of the new agreement, the District Court in No. 73–29 concluded that the lower base wage for day inspectors was a direct product of the company's failure to equalize the base wages for male and female inspectors as of the effective date of the Act. We agree it is clear from the record that had the company equalized the base-wage rates of male and female inspectors on the effective date of the Act, as the law required, the day inspectors in 1969 would have been entitled to the same higher "red circle" rate the company provided for night inspectors.[29] We therefore conclude that on the facts of this case, the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less

[29] The January 1969 agreement provided an 8% or 20¢ per hour across-the-board wage increase, applied to the pre-January 1969 base wage and made retroactive to November 4, 1968. The contract also instituted new "job evaluation" wage rates for various positions. In the case of inspectors, the new "job evaluation" rate was higher than the retroactively increased base wage of day shift inspectors but was lower than the retroactively increased base wage of night shift inspectors. The contract further provided that where the job evaluation rate was less than the current rate for the job—that is, less than the retroactively increased old rate—employees hired before January 20, 1969, would continue to be paid the old rate, through "red circle" protection. Thus, the day shift inspectors received the new job evaluation rate, while the night shift inspectors continued to receive the higher "red circle" night shift base wage. Had the company complied with the law and equalized the base wages of day shift inspectors prior to 1969, the retroactively increased base wage of day shift inspectors would have been the same as the retroactively increased rate of night shift inspectors, and the day shift inspectors would have been entitled to the same "red circle" protection granted the night shift inspectors, since that retroactively increased rate was higher than the new job evaluation rate.

than men for equal work. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971).

The judgment in No. 73–29 is affirmed. The judgment in No. 73–695 is reversed and the case remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of these cases.

THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and would affirm the judgment of the Court of Appeals for the Third Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by Judge Adams in his opinion for the Court of Appeals in *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254 (CA3 1973).